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In the Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-1144

~~Wilson P. Abraham Construction Corporation~~

v.

Texas Industries, Inc.,
Petitioner,

v.

Radcliff Materials, Inc., Jimco, Inc., and
OKC Dredging, Inc.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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INDEX

PAGE

Opinions Below 2

Jurisdiction 2

Question Presented 2

Statement of the Case 2

History of the Litigation and Course of Proceedings 2

Disposition in District Court 4

Disposition in the Fifth Circuit 4

Reasons for Granting the Writ 4

1. The *Abraham* Decision Creates a Split in the Circuits on the Question of Contribution and Denies Petitioner Equal Protection of the Laws 4

2. The *Abraham* Decision is Inconsistent With This Court's Decision in, and the Apparent Underlying Rationale of, *Cooper Stevedoring Co., Inc. v. Fritz Kopke, Inc.* 7

3. The *Abraham* Decision is Inconsistent with This Court's Decision in *Perma Life Mufflers, Inc. v. International Parts Corp.* 8

4. The Fifth Circuit's Decision in *Abraham* is Inconsistent with One of the Basic Objectives of the Antitrust Laws 11

Conclusion 13

Certificate of Service 13

Appendices A-1

CITATIONS

CASES: PAGE

Cooper Stevedoring Co., Inc. v. Fritz Kopke, Inc., 417 U.S. 106 94 S.Ct. 2174 (1974) 7,8

Halcyon Lines v. Haenn Ship Ceiling and Refitting Corp., 342 U.S. 282, 72 S.Ct. 277 (1952). 7,8

Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 88 S.Ct. 2224 (1968). 12

Illinois Brick Co. v. Illinois, 431 U.S. 720, 97 S.Ct. 2061 (1977). 11

In Re Beef Industry Antitrust Litigation, 607 F.2d 167 (5th Cir. 1979) 6

In Re Corrugated Container Antitrust Litigation, 606 F.2d 319 (5th Cir. 1979). 6

Olson Farms, Inc. v. Safeway Stores, Inc., 1979-2 Trade Cases (CCH) ¶62,995 (10 Cir. Nov. 8, 1979), *petition for en banc rehearing filed* (Nov. 23, 1979) 6

Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 88 S.Ct. 1981 (1968). 8,9,10

Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179 (8th Cir. 1979), *en banc rehearing denied* (April 17, 1979) 5,6

Wilson P. Abraham Construction Corp. v. Texas Industries, Inc., 604 F.2d 897 (5th Cir. 1979), *en banc rehearing denied* (Nov. 29, 1979) 2

CITATIONS (Continued)

STATUTES: **PAGE**

15 U.S.C. 1 2

28 U.S.C. 1254(1) 2

OTHER AUTHORITIES:

United States Constitution, Fifth Amendment 7

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Texas Industries, Inc., respectfully petitions for a Writ of Certiorari to review the judgment entered December 26, 1979, of the United States Court of Appeals for the Fifth Circuit.

Opinions Below

The opinion of the United States Court of Appeals for the Fifth Circuit in *Wilson P. Abraham Construction Corp. v. Texas Industries, Inc.* (hereafter *Abraham*) (Appendix A) is reported at 604 F.2d 897. The opinion of the United States District Court for the Eastern District of Louisiana, which was unpublished, appears in Appendix B. Application for rehearing was denied on November 29, 1979.

Jurisdiction

The judgment of the Court of Appeals for the Fifth Circuit was entered on December 26, 1979 (Appendix C) and this petition was filed within 90 days thereafter. This Court's jurisdiction is invoked under 28 U.S.C. 1254 (1).

Questions Presented

Whether a defendant in a Federal antitrust case may seek contribution.

Statement of the Case

History of the Litigation and Course of Proceedings

On January 26, 1973, a grand jury sitting in the United States District Court, Eastern District of Louisiana, handed down criminal indictments charging Petitioner, Texas Industries and one of its employees, Radcliff Materials, Inc. and one of its employees, Jahncke Services, Inc. and one of its employees, and Jimco, Inc. with violations of 15 U.S.C. 1. The

indictments charged the existence of an unlawful combination and conspiracy in unreasonable restraint of interstate trade consisting of an agreement between the defendants to raise and stabilize the price of ready-mix concrete in the New Orleans area. The criminal proceedings were ultimately concluded upon the entry of *nolo contendre* pleas by each of the defendants.

On September 8, 1975, Wilson P. Abraham Construction Corporation instituted this action against Petitioner, Texas Industries, Inc. The complaint centers around alleged antitrust violations by Petitioner and its alleged coconspirators.

Interrogatories filed by Petitioner, and answers thereto, revealed that the unnamed alleged coconspirators included Jimco, Inc., Radcliff Materials, Inc. and Jahncke Services, Inc. Petitioner thereafter filed a third-party complaint naming Jimco, Inc., Radcliff Materials, Inc. and OKC Dredging, Inc. as third-party defendants. In the third-party complaint, Texas Industries sought contribution from the third-party defendants in the event it was found liable to Wilson P. Abraham Construction Corporation in the main demand.

Each of the third-party defendants filed motions pursuant to Federal Rule 12(b)(6) seeking dismissal of the third-party complaint contending that no right of contribution exists among alleged antitrust coconspirators under the antitrust laws of the United States.

Disposition in District Court

The District Court entered a Minute Entry on October 4, 1977 (Appendix C) granting the motions to dismiss filed by the third-party defendants and, on March 29, 1978, the Court entered an order expressly determining that there was no just reason for delay in the entry of judgment until final determination of all issues in this action, and directing the Clerk to enter the October 4, 1977 Minute Entry as a final judgment. In accord with the said March 29, 1978 order, final judgment was entered on March 29, 1978 dismissing Texas Industries' third-party complaint with prejudice.

Disposition in the Fifth Circuit

On April 5, 1978, Texas Industries timely filed its Notice of Appeal from the judgment of the District Court.

On October 16, 1979, the Fifth Circuit handed down its opinion affirming the District Court's dismissal of Petitioner's third-party complaint and holding that no right to contribution exists under the Federal antitrust laws. A petition for rehearing was denied on November 29, 1979, and judgment of the Fifth Circuit was entered on December 26, 1979.

Reasons for Granting the Writ

1. The *Abraham* Decision Creates a Split in the Circuits on the Question of Contribution and Denies Petitioner Equal Protection of the Laws

The decision of the Fifth Circuit Court of Appeals in *Abraham* presents an irreconcilable conflict between the circuits

concerning the issue on which review is sought.

The first appellant court decision involving the right of contribution under the Federal Antitrust laws was that of the Eighth Circuit in *Professional Beauty Supply, Inc. v. National Beauty Supply, Inc.*, [1] handed down February 27, 1979. The principal issue in that case was whether there is a right of contribution in an antitrust case.

Professional, a wholesaler of beauty supplies, alleged that National, also a wholesaler of beauty supplies, had demanded that La Maur, who was a manufacturer of beauty supplies, grant it, National, an exclusive dealership of La Maur's products. Professional contended this constituted monopoly or attempted monopoly in violation of the federal antitrust laws. National filed a third-party complaint against La Maur alleging, in part, that in the event it was found liable to Professional for violation of federal antitrust laws, it was entitled to contribution from La Maur to the extent of one-half the recovery. La Maur filed a motion to dismiss for failure to state a claim, which was granted, and the district court entered final judgment.

Reversing the district court, the Eighth Circuit held that under certain circumstances, a defendant in federal antitrust cases may be entitled to pro rata contribution from other joint tort-feasors. 594 F.2d 1182. The decision of whether a particular party is entitled to contribution was left to the trier of fact upon consideration of all of the circumstances of the case. 594 F.2d at 1186.

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1. 594 F.2d 1179 (8th Cir. 1979), *en banc rehearing denied* (April 17, 1979).

In *Abraham*, the Fifth Circuit Court of Appeals has adopted the opposite rule. Stating that the "sole issue is whether a right of contribution is available to an antitrust defendant under the antitrust laws", (604 F.2d at 899) the Court held that there is no such right. Firmly demonstrating the irreconcilable conflict between the two Circuits, the Fifth Circuit said this, with regard to the Eighth Circuit decision in *Professional Beauty Supply:*

> "Although we have carefully considered the arguments set forth in the majority's opinion, we are unable to agree that a right of contribution should be allowed among violators of the antitrust laws." 604 F.2d at 900.

Two other panels of the Fifth Circuit had the same issue under consideration at the time the *Abraham* decision was handed down and, on that issue, followed the *Abraham* ruling. See *In Re Beef Industry Antitrust Litigation,* [2] and *In Re Corrugated Container Antitrust Litigation.* [3]

On November 8, 1979, the Tenth Circuit Court of Appeals, considering the same issue, decided *Olson Farms, Inc. v. Safeway Stores, Inc.,* [4] and held that no right to contribution exists under the antitrust laws. The Court discussed *Professional Beauty Supply* in detail and then declined to follow it, citing the Fifth Circuit's decision in *Abraham* as support for its position.

Thus, only this Court can resolve the clear split now existing between the Circuits on this very important issue.

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2. 607 F.2d 167 (5th Cir. 1979).

3. 606 F.2d 319 (5th Cir. 1979).

4. 1979-2 Trade Cases (CCH) ¶62,995 (10th Cir. Nov. 8, 1979), *petition for en banc rehearing filed* (Nov. 23, 1979).

The federal antitrust laws were intended to apply, and must be applied, uniformly to all persons subject to those laws. The lack of similar treatment among persons seeking contribution from joint tort-feasors in an antitrust case, depending solely upon the Circuit in which the suit is filed, creates a clear and arbitrary denial to Texas Industries of the equal protection of the laws as guaranteed to it by the Fifth Amendment to the United States Constitution. [5]

2. The *Abraham* Decision is Inconsistent With This Court's Decision in, and the Apparent Underlying Rationale of, *Cooper Stevedoring Co., Inc. v. Fritz Kopke, Inc.*

This Court's most recent expression concerning contribution appeared in *Cooper Stevedoring Co., Inc. v. Fritz Kopke, Inc.*, [6] where it was observed that:

> ". . . a 'more equal distribution of justice' can best be achieved by ameliorating the common-law rule against contribution which permits a plaintiff to force one of two wrongdoers to bear the entire loss, though the other may have been equally or more to blame." 417 U.S. 111

Cooper Stevedoring involved admiralty law. An employee of a stevedore company sued the owner of a vessel for injuries he sustained when he fell into a gap between crates loaded by a second stevedore company, from whom the vessel owner successfully obtained contribution. The second stevedore company contended that the decision was in direct conflict with *Halcyon Lines v. Haenn Ship Ceiling and Refitting*

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5. The Fifth Amendment to the United States Constitution does not specifically contain an equal protection clause. However, this protection has been implied under the Amendment's due process clause. *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 95 S.Ct. 1225 (1975); *Schneider v. Rusk*, 377 U.S. 163, 168, 88 S.Ct. 1187 (1954); *Shapiro v. Thompson*, 394 U.S. 618, 641-42, 89 S.Ct. 1322 (1969); *Bollinger v. Sharpe*, 347 U.S. 497, 74 S.Ct. 693 (1954).

6. 417 U.S. 106, 94 S.Ct. 2174 (1974).

Corp., [7] where this Court had denied contribution from an employer who was statutorily immune from suit by the plaintiff.

In recognizing the right to contribution where there is no statutory immunity, this Court, in *Cooper Stevedoring*, explained its earlier ruling in *Halcyon* this way:

> "Confronted with the possibility that any workable rule of contribution might be inconsistent with the balance struck by Congress in the Harbor Workers' Act between the interests of carriers, employers, employees, and their respective insurers, we refrained from allowing contribution in the circumstances of that case." 417 U.S. 112

In thus restricting *Halcyon* to its peculiar facts, this Court, in *Cooper Stevedoring*, said that:

> "Indeed, it is fair to say that application of the rule of division of damages between joint tortfeasors in admiralty cases has been as broad *as its underlying rationales.* The interests of safety dictate where two parties 'are both in fault, they should bear the damage equally, to make them more careful.' " 417 U.S. 111. (Emphasis added.)

Although decided under admiralty law, the underlying rationale of requiring that where two are at fault, both should bear equal responsibility in order to make them more careful represents a clear expression of this Court's view on contribution. The Fifth Circuit's view is plainly inconsistent.

3. The *Abraham* Decision is Inconsistent with This Court's Decision in *Perma Life Mufflers, Inc. v. International Parts Corp.*

The Fifth Circuit's decision in *Abraham* is patently inconsistent with this Court's rejection, in *Perma Life Mufflers*,

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7. 342 U.S. 282, 72 S.Ct. 277 (1952).

Inc. v. International Parts Corp., [8] of the doctrine of *in pari delicto* (of equal fault) as a defense to an antitrust claim.

The principal question before the Court in *Perma Life* was whether plaintiffs in a private antitrust action can be barred from recovery by *in pari delicto*. The plaintiffs had operated Midas shops under sales agreements with Midas. Their complaint charged that Midas conspired with its parent corporation and two others in violation of the Sherman, Clayton and Robinson-Patman Acts. With respect to the Sherman and Clayton claims, the Court of Appeals held they were barred by application of *in pari delicto*, noting that the plaintiffs had enthusiastically sought the Midas franchises with full knowledge of the allegedly illegal terms of the franchise agreements, had made enormous profits, had eagerly sought additional franchises, and had voluntarily entered into additional franchise agreements while fully aware of the restrictions on products they could carry and on persons they could deal with, all of which they were now challenging as violations of the antitrust laws.

This Court disagreed with the Court of Appeals, noted that there was nothing in the language of the antitrust acts that indicated Congress wanted to make *in pari delicto* a defense to treble-damage actions, and concluded that:

> "The plaintiff who reaps the reward of treble damages may be no less morally reprehensible than the defendant, *but the law encourages his suit to further the overriding public policy in favor of competition.* A more fastidious regard for the relative moral worth of the parties would only result in seriously undermining the usefulness of the private action of a bulwark of antitrust enforcement." 392 U.S. 139 (Emphasis added).

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8. 392 U.S. 134, 88 S.Ct. 1981 (1968).

If, in order to further the objectives of the antitrust laws, a participant in an unlawful scheme is not precluded from suing other participants in the same scheme, and recovering damages caused in part by his own actions, that same participant should not be denied the right to seek contribution from the other participants in the event he is held liable for the same actions to some third party.

In *Abraham,* the Fifth Circuit Court of Appeals construed *Perma Life* narrowly, interpreting it only as a *partial* rejection of *in pari delicto* as a defense. In reaching this construction, the Fifth Circuit emphasized the fact that in *Perma Life* the culpable plaintiff was economically less powerful than the defendant and was not, in any meaningful sense, a voluntary participant in the illegal scheme.

Petitioner need not quarrel with the Fifth Circuit's narrow construction of *Perma Life* for even that narrow construction is patently inconsistent with its decision denying a right to contribution. Its construction of *Perma Life* recognizes, at the very least, that *some* participants in an unlawful scheme can file their own suit. Yet, its decision in *Abraham* is that *none* could file suit for contribution.

This Court should grant the writ to reconcile the two decisions.

4. The Fifth Circuit's Decision in *Abraham* is Inconsistent with One of the Basic Objectives of the Antitrust Laws

The objectives of the federal antitrust laws are threefold. They are designed to deter violations of the laws, to compensate victims of anticompetitive activities, and to deprive those who violate the laws from the fruits of their illegal acts.

The Fifth Circuit in *Abraham* reached its decision on the apparent premise that there is only one paramount objective, that of deterring violations. The Court did not address the other objectives of the antitrust laws.

This Court, on the other hand, has treated the three basic objectives of the antitrust laws as apparent equals. While determining the issue of whether indirect purchasers can recover under the antitrust laws in *Illinios Brick Co. v. Illinois,* [9] the Court said:

> "It is true that, in elevating direct purchasers to a preferred position as private attorneys general, the *Hanover Shoe* rule denies recovery to those indirect purchasers who may have been actually injured by antitrust violations. Of course, as Mr. Justice BRENNAN points out in dissent, 'from the deterrence standpoint, it is irrelevant to whom damages are paid, so long as some one redresses the violation.' *Post,* at 2082. But § 4 has another purpose in addition to deterring violators *and depriving them of 'the fruits of their illegality', Hanover Shoe, supra,* 392 U.S. at 494, 88 S.Ct., at 2232; it is also designed to compensate victims of antitrust violations for their injuries." (Emphasis added) 431 U.S. at 746.

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9. 431 U.S. 720, 97 S.Ct. 2061 (1977).

The importance of depriving the anti-trust violator of the fruits of his illegality was also recognized in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, [10] where it was said that:

> "In addition, if buyers are subjected to the passing-on defense, those who buy from them would also have to meet the challenge that they passed on the higher price to *their* customers. These ultimate consumers, in today's case the buyers of single pairs of shoes, would have only a tiny stake in a lawsuit and little interest in attempting a class action. In consequence, those who violate the antitrust laws by price fixing or monopolizing *would retain the fruits of their illegality because no one was available who would bring suit against them. Treble-damage actions, the importance of which the Court has many times emphasized, would be substantially reduced in effectiveness.* 88 S.Ct. at 2232 (Emphasis added)

Congress has already provided a great deterrence in that those found guilty of violating the antitrust laws will pay treble damages. In addition, a persuasive argument can be made that contribution enhances deterrence by ensuring that no one avoids liability.

However, the objective of depriving the tort-feasor of the fruits of his illegal acts can be assured *only* where there is a rule permitting contribution.

The denial of contribution would actually bring about a result totally anomalous to the very intent behind passage of the antitrust laws, which is to promote, encourage and protect competition. Permitting a plaintiff to shift total loss onto only one of multiple wrongdoers could, in many cases, deter and hinder competition by unduly burdening the one defendant with the whole loss.

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10. 392 U.S. 481, 88 S.Ct. 2224 (1968).

CONCLUSION

Petitioner suggests that the contribution issue involves questions of exceptional importance concerning federal law. The issue has not been, but should be, resolved by this Court.

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Dated, January 1980

CERTIFICATE OF SERVICE

Undersigned counsel for Petitioner certifies that service of this Petition for Writ of Certiorari has been made upon counsel for respondents this date, in accordance with law, by depositing three copies thereof in the United States Mail, postage prepaid, to the following persons:

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Appendices

APPENDIX A

WILSON P. ABRAHAM CONSTRUCTION CORPORATION, Plaintiff

v.

TEXAS INDUSTRIES, INC. and Frank T. Dooley, Defendants.

TEXAS INDUSTRIES, INC., Third-Party Plaintiff-Appellant,

v.

RADCLIFF MATERIALS et al., Third-Party Defendants-Appellees,

Jahncke Service, Third Party Defendant.

No. 78-1788.

United States Court of Appeals
Fifth Circuit

October 16, 1979.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before THORNBERRY, AINSWORTH and MORGAN, Circuit Judges.

THORNBERRY, Circuit Judge:

Texas Industries, Inc., the defendant in a civil antitrust action, appeals the dismissal of its third-party complaint impleading its alleged coconspirators and seeking contribution. The sole issue is whether a right of contribution is available to an antitrust defendant under the federal antitrust laws. We hold that there is no such right of contribution.

I.

This action was instituted on September 8, 1975, by Wilson P. Abraham Construction Corp., not a party to this appeal, against Texas Industries, Inc. [1] for damages arising out of an alleged price-fixing scheme. Abraham's complaint asserts that Texas Industries and certain unnamed coconspirators engaged in an unlawful combination and conspiracy to raise and stabilize the price of ready-mix concrete in the New Orleans area in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. [2] Abraham seeks to recover treble damages under 15 U.S.C. § 15.

Discovery instituted by Texas Industries revealed that the unnamed alleged coconspirators were Radcliff Materials, Inc., Jimco, Inc., and OKC Dredging, Inc. Texas Industries then filed a third-party complaint against these parties seeking contribution from them should it be found liable to Abraham in the main demand. The third-party defendants filed motions to dismiss the third-party complaint pursuant to Rule 12(b)(6) for failure to state a claim upon which relief could be granted.

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1. A former employee of Texas Industries, Frank T. Dooley, was named as a defendant but has never been served.

2. On January 26, 1973, a grand jury handed down criminal indictments charging Texas Industries and one of its employees, Radcliff Materials, Inc. and one of its employees, Jahncke Services, Inc. (later changed to OKC Dredging, Inc.) and one of its employees, and Jimco, Inc. with violations of 15 U.S.C. § 1. The indictments charged the existence of an unlawful combination and conspiracy in unreasonable restraint of interstate trade and, in particular, accused the defendants of entering into an agreement to raise and stabilize the price of ready-mix concrete in the New Orleans area. The criminal proceedings were ultimately concluded upon the entry of *nolo contendere* pleas by each of the defendants.

On October 4, 1977, the district court entered a Minute Entry granting the motions to dismiss the third-party complaint with prejudice on the ground that no right of contribution exists among antitrust coconspirators under federal law. Although persuaded by Texas Industries' arguments in favor of allowing contribution, the court deferred to what it considered the "weight of authority" [3] denying such a right to an antitrust defendant. On March 29, 1978, the court determined that there was no just reason for delay and directed that the Minute Entry be entered as a final judgment. Texas Industries appealed.

In their briefs and at oral argument the third-party defendants correctly asserted that no federal court had ever recognized a right of contribution among antitrust coconspirators. *See Olson Farms, Inc. v. Safeway Stores, Inc.*, [1977-

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3. The court cited four cases as holding that there is no right to contribution among coconspirators in a federal antitrust case. *American Motor Inns, Inc. v. Holiday Inns, Inc.*, 521 F.2d 1320 (3d Cir. 1975); *Walker Distrib. Co. v. Lucky Lager Brewing Co.*, 323 F.2d 1 (9 Cir. 1963); *Sabre Shipping Corp. v. American President Lines, Ltd.*, 298 F.Supp. 1339 (S.D.N.Y. 1969); *Wainwright v. Kraftco. Corp.*, 58 F.R.D. 9 (N.D.Ga. 1973). However, only the decisions in *Sabre Shipping*, which confronted the issue of contribution, and *Kraftco*, which arguably implies a no-contribution rule, are in point. The decisions in *American Motor Inns* and *Walker Distributing* only state the general rule that an antitrust plaintiff need not sue all coconspirators but may choose to proceed against any one or combination of them.

2] Trade Reg. Rep. (CCH) ¶ 61,698 (D.Utah 1977), *argued and submitted*, No. 77-2068 (10 Cir. March 16, 1979); *El Camino Glass v. Sunglo Glass Co.*, [1977-1] Trade Reg. Rep. (CCH) ¶ 61,533 (N.D. Cal. 1976); *Sabre Shipping Corp. v. American President Lines, Ltd.*, 298 F.Supp. 1339 (S.D.N.Y. 1969). [4] Unfortunately for the third-party defendants, however, the most recent, and only appellate, court to specifically consider this issue abruptly jettisoned the limited precedent and adopted the very position previously rejected by the district courts. In *Professional Beauty Supply, Inc. v. National Beauty Supply, Inc.*, 594 F.2d 1179 (8 Cir. 1979), an Eighth Circuit panel, with one judge dissenting, held that an antitrust defendant should, at least under certain circumstances, be entitled to contribution from those "joint tortfeasors" [5] not sued by the

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4. *See also Goldlawr, Inc. v. Schubert*, 276 F.2d 614, 616 (3d Cir. 1960) (dictum); *Baughman v. Cooper Jarrett, Inc.*, 391 F.Supp. 671, 678 n.3 (W.D.Pa.1975), *aff'd and modified on other grounds*, 530 F.2d 529 (3d Cir.), *cert.denied*, 429 U.S. 825, 97 S.Ct. 78, 50 L.Ed.2d 87 (1976) (dictum); *Gould v. American-Hawaiian S.S. Co.*, 387 F.Supp. 163 (D.Del.1974) (dictum); *Wainwright v. Kraftco Corp.*, 58 F.R.D. 9, 11-12 (N.D.Ga.1973) (arguably by implication); *Washington v. American Pipe & Constr. Co.*, 280 F.Supp. 802, 804-05 (S.D. Cal.1968) (arguably by implication). *But see Chevalier v. Baird Sav. Ass'n*, 72 F.R.D. 140, 145 n.6 (E.D.Pa.1978) (dictum).

5. The case law has uniformly characterized a private antitrust suit as a tort action. *See, e. g. Solomon v. Houston Corrugated Box Co.*, 526 F.2d 389, 392 n.4 (5 Cir. 1976); *Simpson v. Union Oil Co.*, 311 F.2d 764, 768 (9 Cir.), *rev'd on other grounds*, 377 U.S. 13, 84 S.Ct. 1051, 12 L.Ed.2d 98(1963); *Williamson v. Columbia Gas & Electric Corp.*, 110 F.2d 15 (3d Cir. 1969), *cert. denied*, 310 U.S. 639, 60 S.Ct. 1087, 84 L.Ed. 1047 (1940); *Tondos v. Amateur Hockey Ass'n*, 438 F.Supp. 310, 315 (N.Y. 1977); *Wolf Sales Co. v. Rudolph Wurlitzer Co.*, 105 F.Supp. 506 (Colo. 1952).

(Footnote continued on following page)

plaintiff in the main demand. Although we have carefully considered the arguments set forth in the majority's opinion, we are unable to agree that a right of contribution should be allowed among violators of the antitrust laws.

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5. (continued)

One commentator, however, has questioned the assumption that private antitrust actions sound in tort or that antitrust violators are necessarily "tortfeasors." Note, *Contribution in Private Antitrust Suits*, 63 Cornell L.Rev. 682, 692-97 (1978). As that writer notes, a large percentage of antitrust actions do not involve activity considered tortious under the common law. Since the no-contribution rule has traditionally applied only to joint tortfeasors, the writer suggests that the courts should carefully examine the nature of the particular antitrust violation to see what common law form of action most closely resembles the plaintiff's statutory claim. Because he concludes that price-fixing arrangements more closely resemble quasi-contract than tort, he apparently would award contribution in this case.

We cannot subscribe to this analysis. First, the focus of the antitrust laws is not so much on the defendant's unjust enrichment as on the injuries the plaintiff has suffered. In fact, the plaintiff's right to damages is totally independent of whether the defendant has profited at the plaintiff's expense. Thus, we cannot agree that price-fixing "more closely resembles quasi-contract than tort." Second, the anti-competitive activity which escaped liability at common law has, because of altered social and economic conditions, become unacceptable behavior in modern society. Indeed, conduct once non-tortious has become criminal under the antitrust statutes, It is difficult to believe that the law of torts, which has always been in constant flux, would not have eventually encompassed such conduct if legislation had not preempted the field. We believe that the same rationale justifying a no-contribution rule among "tortfeasors" applies to intentional antitrust violators. *See* Corbett, *Apportionment of Damages and Contribution Among Coconspirators in Antitrust Treble Damages Actions*, 31 Fordham L.Rev. 111, 114 (1962).

II.

There is no statutory right of contribution provided for under either the Sherman Act, 15 U.S.C. § 1 et seq., or the Clayton Act, 15 U.S.C. § 12 et seq. We do not, however, interpret this omission as evidence that Congress necessarily intended to deny contribution under the antitrust laws. *But see Sabre Shipping, supra,* 298 F.Supp. at 1345. It is more likely that this narrow question, although a matter of some importance, never occurred to the drafters of the legislation. Our task, therefore, is to guess what Congress "would have intended on a point not present to its mind, if the point had been present." [6] We agree with the case law that this issue must be resolved by reference to federal common law. [7]

Texas Industries advances a number of arguments for implication of a right of contribution. First, it argues that the deterrent effect of treble damages is dissipated by the possibility that only one of a number of conspirators would actually be liable for the injury. We conclude with prevailing economic

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6. B. Cardozo, The Nature of the Judicial Process 15 (1949).

7. *Professional Beauty Supply, Inc., supra,* 594 F.2d at 1182; *El Camino Glass, supra* at 72, 111 n.1; *Sabre Shipping Corp., supra,* 298 F.Supp. at 1343. *See generally Sola Electric Co. v. Jefferson Co.* 317 U.S. 173, 176, 63 S.Ct. 172 87 L.Ed. 165 (1942).

At common law no right of contribution existed among intentional tortfeasors. *Merryweather v. Nixan,* 8 Term.Rep. 186, 101 Eng.Rep. 1337 (K.B.1799). This no-contribution rule was subsequently extended to cases involving unintentional conduct, *see* W. Prosser, Law of Torts § 50 at 305-06 (4th ed. 1971), and was adopted by the federal common law. *Union Stockyards Co. v. Chicago, B. & Q. R.R.,* 196 U.S. 217, 25 S.Ct. 226, 49 L.Ed. 453 (1905). This rule, however, had been

theory, [8] however, that that very possibility of imposition of sole liability has an enhanced deterrent effect. The chance that a participant may be faced with a full judgment is more likely to discourage anticompetitive conduct than discourage anticompetive conduct than would ensuring that each participant pays only some fair share. Allowance of contribution in effect ensures that the burden upon a particular defendant

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7. (continued)
modified in some cases, at least among unintentional tortfeasors, *see, e. g., Kohr v. Allegheny Airlines, Inc.*, 504 F.2d 400 (7 Cir. 1974), *cert. denied*, 421 U.S. 978 (1975), and the Eighth Circuit has rejected the rule in its entirety in the antitrust context. *See Professional Beauty Supply, Inc. v. National Beauty Supply, Inc.*, 594 F.2d 1179 (8 Cir. 1979). The *Professional Beauty Supply* court relied upon *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S. 106, 94 S.Ct. 2174, 40 L.Ed. 2d 694 (1974), as indicative of the erosion of the no-contribution rule. Even assuming that *Cooper Stevedoring*, an admiralty case, is apposite, it would not be dispositive of the present case since the implication of a clause of action under the federal common law is a discrete inquiry focused upon the circumstances of a particular case.

8. Economists have argued that business managers, particularly in larger organizations, are general "risk averse" - that is, they are deterred more by the slight prospect of a large loss than by the strong prospect of a small loss. If this hypothesis is correct, application of the rule denying contribution should inhibit those managers who are aware of the rule from participating in unlawful group activity: Although the rule decreases the likelihood that an individual participant will be held liable, it increases the size of the potential liability.

Note, *supra*, 63 Cornell L.Rev. at 702. The author of the note suggests that the participant's unfamiliarity with the no-contribution rule may limit its deterrent effect. We are convinced, however, that, as a class, antitrust defendants are more likely to be familiar with the no-contribution rule than tortfeasors in general. Furthermore, the percentage of participants unaware of the rule will certainly decrease as the rule is applied.

would be ameliorated by a division of liability. *See Sabre Shipping Corp. v. American President Lines, Ltd.*, 298 F.Supp. 1339 (S.D.N.Y.1969); *El Camino Glass v. Sunglo Glass Co.*, 1977-1 Trade Cases ¶ 61,533 (N.D.Cal.1976). Even assuming, however, that the arguments concerning the relative deterrent effects are inconclusive, *see Professional Beauty Supply, Inc. v. National Beauty Supply, Inc.*, 594 F.2d 1179 (8 Cir. 1979) (Hanson, J., dissenting in part), this inconclusiveness would hardly be a compelling reason upon which to base a rule allowing contribution. *Id.* at 1189.

Second, Texas Industries suggests that a rule prohibiting contribution would encourage collusion by the plaintiff with one or more of the potential defendants to the action. Similarly, the Eighth Circuit expressed concern that under a no-contribution rule a large or powerful wrongdoer would have sufficient economic influence to coerce a plaintiff into excluding it as a defendant. Although the possibility of collusion or coercion has always existed under a no-contribution rule, the courts and legislatures have not deemed this threat sufficient to counterbalance the advantages derived from denying contribution to wrongdoers. Texas Industries has not suggested that there has been collusion or coercion in this case, and we are unwilling to assume that the plaintiff engaged in or yielded to these tactics. Should a defendant establish that it is the victim of such maneuvering, it may well have an independent cause of action, at least as against its coconspirators.

Third, Texas Industries contends that a rule denying contribution is inconsistent with the Supreme Court's rejection of *in pari delicto* as a defense to an antitrust action in *Perma*

Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 88 S.Ct. 1981, 30 L.Ed.2d 982 (1968). Texas Industries reasons that if a participant in an unlawful scheme is not precluded from recovering treble damages from the other participants, no possible rationale can justify the denial of his right to seek contribution from his fellow wrongdoers.

As an initial matter, we are unable to agree with Texas Industries' assessment of the Court's decision in *Perma Life*. Notwithstanding the language in Justice Black's principal opinion, [9] the decision does not endorse a wholesale rejection of the *in pari delicto* doctrine in an antitrust treble damages action. First, the Court made clear that the culpable plaintiff in that case was economically less powerful than the defendant and was not in any meaningful sense a voluntary participant in the illegal scheme. *Id.* at 139, 88 S.Ct. 1981. Consequently, the Court had no opportunity to decide whether a plaintiff might, wholly apart from *in pari delicto*, be precluded from recovery because of his "complete involvement" in the illegal scheme. *Id.* at 140, 88 S.Ct. 1981.

More important, five members of the *Perma Life* court emphasized their belief that some aspects of the *in pari delicto* doctrine should be retained under the antitrust laws. *Id.* at 146, 88 S.Ct. 1981 (White, J., concurring) (plaintiff barred where he and defendant bear "substantially equal responsibility" for injury); *id* at 147, 88 S.Ct. 1981, 1989 (Fortas, J., concurring in the result) (plaintiff barred where "the fault

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9. We therefore hold that the doctrine of *in pari delicto*, with its complex scope, contents, and effects, is not to be recognized as a defense to an antitrust action.

of the parties is reasonably within the same scale"); *id.* at 149, 88 S.Ct. at 1989 (Marshall, J., concurring in the result) (plaintiff barred where he "actively participated in the formation and implementation of an illegal scheme"); *id.* at 154, 88 S.Ct. 1981 (Harland, J., and Stewart, J., concurring in part and dissenting in part) (plaintiff barred who violated the law "in cooperation with defendant"). Subsequently lower court opinions have concluded that *Perma Life* refuses an *in pari delicto* defense only to those "plaintiffs who do not bear equal responsibility for creating and establishing an illegal scheme, or who are required by economic pressures to accept such an agreement." *Premier Electrical Constr. Co. v. Miller Davis Co.*, 422 F.2d 1132, 1138 (7 Cir.), *cert. denied*, 400 U.S. 828, 91 S.Ct. 56, 27 L.Ed.2d 58 (1970). *See Bernstein v. Universal Pictures, Inc.* 517 F.2d 976 (2d Cir. 1975); *Columbia Nitrogen Corp. v. Royster Co.*, 451 F.2d 3, 15-16 (4 Cir. 1971); *see also Javeline Corp. v. Uniroyal, Inc.*, 546 F.2d 276, 278-79 (9 Cir. 1976); *Dreibus v. Wilson*, 529 F.2d 170, 174 (9 Cir. 1975); ABA Antitrust Law Developments 297-99 (2d ed. 1975). [10]

Furthermore, the partial rejection of the *in pari delicto* defense in *Perma Life* does not require that we recognize a right of contribution among antitrust coconspirators. There is an obvious and fundamental difference between a

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10. In *Greene v. General Foods*, 517 F.2d 635, 646-47 (5 Cir. 1975), a panel of this court indicated that it "seriously question[ed]" the argument that *in pari delicto* retained vitality after *Perma Life*. That court, however, expressly did not rule on this point. *See also Kestenbaum v. Falstaff Brewing Corp.*, 514 F.2d 690 (5 Cir. 1975).

rule that bars suit by a plaintiff who in any way participated in the antitrust violation and a rule that forbids a defendant from obtaining contribution from his fellow wrongdoers. A rule barring any culpable plaintiff diminishes the deterrent effect of the antitrust laws by reducing the pool of potential private attorneys general who can instigate costly and uncertain antitrust litigation. However, as we previously noted, a rule prohibiting contribution among antitrust coconspirators not only does not frustrate deterrence but may very well enhance the statutes' deterrent effect by preventing a defendant from cutting its losses. [11]

Fourth, Texas Industries asserts that the denial of contribution in an antitrust context is inconsistent with the allowance of contribution under other federal statutes. A number of cases have recognized a right of contribution under certain provisions of the federal securities laws that do not expressly provide for such a right. *Gould v. American Hawaiian Steamship Co.*, 387 F.Supp 163 (D.Del.1974), *vacated on other*

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11. In a contribution action there is necessarily an antitrust defendant who is faced with potential liability to an injured plaintiff; deterrence does not suffer if contribution is denied since a real threat of liability exists for all participants in the illegal scheme - any one of them could have been selected as the defendant in the plaintiff's action. On the other hand, a rule that bars suit by any plaintiff who participated in the wrong will, in many instances, mean that no defendant will face liability since there is no plaintiff willing to bring the action - a result that clearly undermines the deterrence objectives of the antitrust laws.

grounds, 535 F.2d 761 (3d Cir. 1976); *Alexander & Baldwin, Inc. v. Peat, Marwick, Mitchell & Co.*, 385 F.Supp. 230 (S.D. N.Y.1970), *aff'd per curiam*, 442 F.2d 1376 (2d Cir. 1971); *de Haas v. Empire Petroleum Co.*, 286 F.Supp. 809 (D.Colo. 1968), *modified on other grounds*, 435 F.2d 1223 (10 Cir. 1970). As these cases have recognized, however, both the Securities Act of 1933 and the Exchange Act of 1934 make express statutory provision for contribution, [12] and the allowance of contribution in these cases can be explained under the general principle that the securities laws are to be administered *in pari materia*. *Globus, Inc. v. Law Research Service, Inc.*, 318 F.Supp. 955, 958 (S.D.N.Y.1970), *aff'd per curiam*, 442 F.2d 1376 (2d Cir. 1971); Fisher, *Contribution in 10b - 5 Actions*, 33 Bus.Lawyer 1821, 1826 (1973); Note, *supra*, 63 Cornell L.Rev. at 698 n.85. Since there is no express provision for contribution under the antitrust laws, we are unable to use cases decided under the securities laws as authority for implying such a right in this case.

As further evidence of a judicial trend toward contribution in other areas of federal law, Texas Industries cites both FELA cases [13] and sex discrimination cases decided under the

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12. Section 11(f) of the 1933 Act, 15 U.S.C. § 77k(f), and §§ 9(e) and 18(b) of the 1934 Act, 15 U.S.C. §§ 78i(e), 78r(b).

13. *Chicago & N.W. Ry. v. Minnesota Transfer Ry.*, 371 F.2d 129 (8 Cir. 1967); *Zontelli Bros. v. Northern P. Ry.*, 263 F.2d 194 (8 Cir. 1959); *Blair v. Cleveland Twist Drill Co.*, 197 F.2d 842 (7 Cir. 1952); *Patterson v. Pennsylvania Ry.*, 197 F.2d 252 (2d Cir. 1952).

Civil Rights Act. [14] The FELA cases were negligence actions in which contribution was allowed on the basis of state law and, therefore, do not support Texas Industries' argument that a federal right to contribution should be extended to an antitrust defendant. The cases decided under the Civil Rights Act do not even discuss the rationales for allowing contribution. We decline to discard an established rule of law by relying on cases that offer no reasons.

Finally, Texas Industries proffers that denying contribution amounts to a taking of property without due process and equal protection of the laws as guaranteed by the Fifth Amendment. This constitutional violation is premised on the supposed unfairness which results when an antitrust defendant is forced to bear a disproportionate share of the damages caused by the conspiracy to which he was a party. Although we realize that the denial of contribution among wrongdoers, together with a plaintiff's right to sue and collect from only one defendant, [15] can saddle a defendant with a

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14. *Stevenson v. International Paper Co.*, 432 F.Supp. 390 (W.D.La.1977); *International Union of Electrical, Radio and Machine Workers v. Westinghouse Electric Corp.*, 73 F.R.D. 57 (W.D.N.Y.1976); *Lynch v. Sperry Rand Corp.*, 62 F.R.D. 78 (S.D.N.Y.1973); *Gilbert v. General Electric Corp.*, 59 F.R.D. 267 (E.D.Va.1973).

15. Antitrust coconspirators are jointly and severally liable for all damages caused by the conspiracy to which they were a party. *Solomon v. Houston Corrugated Box Co.* 526 F.2d 389, 392, n.4 (5 Cir. 1976); *Wainwright v. Kraftco*, 58 F.R.D. 9, 11-12 (N.D.Ga.1973); *Washington v. American Pipe & Constr. Co.*, 289 F.Supp. 802, 804 (S.D.Cal.1968). A private plaintiff need not sue all coconspirators but may choose to proceed against any one or more of them. *Hennessey v. National Collegiate Athletic Ass'n*, 564 F.2d 1136 (5 Cir. 1977); *American Motor Inns, Inc. v. Holiday Homes Inc.*, 521 F.2d 1230 (3d Cir. 1975); *Walker Distrib. Co. v. Lucky Lager Brewing Co.*, 323 F.2d 1 (9 Cir. 1963).

substantial financial burden, we do not think the imposition of this burden offends constitutional principles.

The Fifth Amendment commands that the Federal government refrain from depriving a person of his property "without due process of law." Due process has both a procedural and a substantive aspect. Procedural due process ensures the observance of certain procedural safeguards designed to afford protection against arbitrary governmental deprivation. Under this analysis, property may not be taken without providing the minimal protections of notice and an opportunity to be heard. Texas Industries does not, and cannot, claim a procedural due process infringement. The judicial proceeding required before the treble damages penalty can be imposed goes far beyond the threshold requirement of procedural due process.

Substantive due process requires that all legislation be rationally related to the furtherance of a legitimate governmental objective. Since the close of "the *Lochner* era" [16] in the late 1930's judicial scrutiny of economic or social legislation has been virtually nonexistent. Instead, especially in the realm of economic regulation, the courts have exhibited great deference to legislative judgment and have upheld legislation if there is *any* rational basis for enacting a particular

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16. This phrase takes its name from the Supreme Court's opinion in *Lochner v. New York*, 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937 (1905), and refers to the period between 1897 and 1937 when the Court invalidated most state and federal legislation on substantive due process grounds. *See* L. Tribe, American Constitutional Law §§ 8-2 to 8-7 (1978); J. Nowak, R. Rotunda, & J. Young, Constitutional Law 397-410 (1978).

economic measure. *See, e. g., United States v. Carolene Products Co.,* 304 U.S. 144, 58 S.Ct. 778, 82 L.Ed. 1234 (1938). Indeed, the courts have even been willing to hypothesize legislative objectives and possible reasons for the law's enactment. *See, e. g., Williamson v. Lee Optical Co.,* 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1955).

Texas Industries' substantive due process argument cannot survive in such a harsh climate. We have no difficulty in concluding that a rule denying contribution to antitrust coconspirators comports with the "mere rationality" test utilized by the courts to scrutinize economic legislation. Although denying contribution may create a more severe penalty under the treble damages provision of the antitrust laws than exists at common law, the powerful deterrent effect provided by such a penalty is certainly a rational basis for a no-contribution rule.

Texas Industries' equal protection argument is equally unacceptable. The equal protection guarantee of the Fifth Amendment's due process clause [17] requires that all

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17. Although the Fifth Amendment does not contain an equal protection clause, the protections guaranteed under that concept have, to a large degree, been implied under the amendment's due process clause. *See Weinberger v. Wiesenfeld,* 420 U.S. 636, 638 n.2, 95 S.Ct. 1225, 43 L.Ed.2d 514 (1975). ("This Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment."); *Schneider v. Rusk,* 377 U.S. 163, 168, 84 S.Ct. 1187, 12 L.Ed.2d 218 (1954); *Shapiro v. Thompson,* 394 U.S. 618, 641-42, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969); *Bolling v. Sharpe,* 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954).

governmental classifications rationally relate to a legitimate governmental purpose. The essence of the requirement is that the government treat all those similarly situated similarly. *See* Tussman & tenBroech, *The Equal Protection of the Laws*, 37 Calif.L.Rev. 341 (1949). In applying the equal protection rationality requirement, the courts have utilized various standards of review depending on the type of legislation being scrutinized. In reviewing economic regulation the courts have exhibited the same deference to legislative judgment accorded under a due process analysis. The test generally applied in such cases is whether there is any "conceivable basis" justifying the governmental classification. [18] Under this analysis, denying contribution does not deprive Texas Industries of equal protection of the law. The purpose of the antitrust laws is to preserve and promote the public interest in competition by ensuring the existence of an open and free market. We cannot say that a no-contirbution rule, because of its deterrent effect, is not rationally related to the achievement of this purpose.

III.

Throughout this opinion we have treated all antitrust defendants as equally culpable, and, therefore, equally undeserving of contribution. An argument could be made, however, that a distinction should be drawn between intentional and unintentional violators. The crux of this argument rests upon the conclusion that an antitrust defendant whose

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18. *See, e. g., McGowan v. Maryland*, 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961); *Williamson v. Lee Optical*, 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1955); L. Tribe, *supra* § 16-3.

liability is premised solely upon the illegal effects of its actions should not be treated as harshly as a defendant whose culpability arises from a determination of an illegal purpose. Even assuming that inequity may occur in a particular case, however, we believe that creating a contribution right for an unintentional violator may inimically affect the implementation of the antitrust laws. The possible detriments that can be envisioned make this an inappropriate case for the exercise of our power to shape the federal common law even to this limited extent.

First, allowing a right of contribution for an unintentional violator may diminish the deterrent function of trebled damages. As an initial matter, deterrence in reference to an unwitting price-fixer may appear to be irrelevant. We believe it reasonable to assume, however, that even businesses of the purest motives necessarily steer wide of any conduct the effects of which may violate the law, in the knowledge that full, trebled damages possibly await even an unintentional transgression. Allowing contribution may diminish this prophylactic, chilling effect by reducing the threatening spector of sole liability. Businesses may be encouraged to risk anticompetitive conduct secure in the knowledge that proof of illegal purpose is often impossible and that liability for illegal effects will be dissipated.

Second, the overall effects upon plaintiff's case of allowing contribution even for an unintentional violation are problematic. In *Professional Beauty Supply, Inc. v. National Beauty Supply, Inc.*, 594 F.2d 1179 (8 Cir. 1979), the court, in allowing contribution for all antitrust defendants, dismissed this concern by pointing out that district courts have considerable discretion in managing complex cases to diminish any adverse effects upon plaintiffs. However, as Judge Hanson, a district

judge sitting by designation, noted in his partial dissent, private plaintiffs may derive cold comfort from "the mere possibility of the favorable uses of district court discretion." *Id.* at 1190.

> Aware that litigation may spiral out of their control, it is forseeable that some plaintiffs will decide to forego a legitimate cause of action. Though district courts have the power to superintend complex litigation, the multiplication of issues and parties remains to be grappled with, and the chilling effect on the incentive to bring or pursue a lawsuit is unlikely to be diminished by the mere possibility of the favorable uses of district court discretion.

Id. at 1190. (Hanson, Jr., dissenting in part).

Similarly, a district judge in this circuit has rejected implication of third-party claims based upon his determination that such claim would be unmanageable. *See In re Corrugated Container Antitrust Litigation*, - F.Supp. - (S.D.Tex.1979). These concerns expressed by district judges buttress our conclusion that allowance of third-party claims may open a Pandora's box of procedural problems, against which district court discretion may prove a palliation.

Third, there appears to be no reason for drawing a distinction between intentional and unintentional violators other than to ensue equity in a particular case. There may well be antitrust violators who are entirely unwitting, but we refuse to distort the antitrust laws in order to remedy a problematic inequity. Moreover, any contribution may well amount to a windfall of sorts for a defendant because of the fortuity of plaintiff's proof.

IV.

Our decision in this case is certainly subject to reasonable contrary arguments. In this area of interstitial lawmaking, however, to forge a new rule with questionable benefits and such possible detriments is a bad practice. Those aggrieved by this decision always have recourse to Congress, a forum better suited to evaluation of the competing interests and policies involved. In the absence of more compelling arguments in favor of contribution, this court is reluctant to create such a right as a matter of federal common law.

Affirmed.

LEWIS R. MORGAN, Circuit Judge, concurring in part and dissenting in part:

I concur in the majority opinion insofar as it denies a right of contribution to defendants who have intentionally violated the antitrust laws. I dissent, however, from the determination that an unintentional violator [1] should be absolutely barred from seeking contributions from his fellow wrongdoers.

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1. Although intent is a necessary element of a criminal antitrust offense, a defendant may incur *civil* liability for an unintentional violation of the antitrust laws. *United States v. United States Gypsum Co.*, 438 U.S. 422, 98 S.Ct. 2864, 57 L.Ed.2d 854, 869 n.13 (1978). There is nothing new in this principle, for the courts have long recognized that "the *per se* rule against price fixing applies to any arrangement among competitors which, *in purpose or effect,* directly or indirectly inhibits price competition." L. Sullivan, Antitrust § 74 at 198 (1977) (emphasis added).

Historically, no right of contribution has been available among intentional tortfeasors. The courts have reasoned that limited judicial resources should not be wasted on a party whose cause of action is founded upon his own deliberate wrong. Restatement (Second) of Torts § 836A, Comment a (1979); Restatement of Restitution, Introductory Note to Ch. 3, Title C at 386 (1937). As noted in the majority opinion, Texas Industries has offered no convincing reason for departing from the common law no-contribution rule in the context of an intentional violation of the antitrust laws. What the majority fails to note is the modern trend toward recognizing a right of contribution among unintentional tortfeasors. Three fourths of the American jurisdictions [2] now agree with Dean Prosser's observation that

> [t]here is obvious lack of sense and justice in a rule which permits the entire burden of a loss, for which two defendants were equally, unintentionally responsible, to be shouldered onto one alone.

Prosser, Law of Torts § 50 at 307. Absent proof that the purposes of the antitrust laws would be frustrated under a

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2. Note, Contribution in Private Antitrust Suits, 63 Cornell L.Rev. 682, 698 (1978). A number of courts have allowed contribution among unintentional wrongdoers under federal common law. See, e. g., *Kohr v. Allegheny Airlines*, 504 F.2d 400 (7th Cir. 1974). *cert. denied*, 421 U.S. 978, 95 S.Ct. 1980, 44 L.Ed.2d 470 (1975); *Gomes v. Broadhurst*, 394 F.2d 465 (3rd Cir. 1967); *Knell v. Feltman*, 85 U.S. App.D.C. 174, 174 F.2d 662 (1949). The Restatement (Second) of Torts § 886A (1979) recognizes a right of contribution among unintentional tortfeasors.

limited contribution rule, I would, in the interest of fairness, award contribution to a defendant whose liability is based solely on an unintentional violation of the antitrust laws.

The majority suggests that awarding contribution to unintentional violators could undermine the antitrust law's effectiveness in discouraging anticompetitive behavior. According to the court's analysis, two problems arise even under a limited contribution rule: (1) the deterrent effect of the private damage action may be diminished if defendants are allowed to distribute the financial burden of a treble damages judgment and (2) the lawsuit will be made more complex and difficult to manage, thereby dissuading plaintiffs from bringing such actions. Neither argument is persuasive.

The deterrence argument has been relied on by courts as a reason both for denying and for awarding contribution in an antitrust case. *Compare El Camino Glass v. Sunglo Glass Co. with Professional Beauty Supply, Inc.*, 594 F.2d 1179 (8th Cir. 1979). The majority opinion favors the position adopted by the district court in *El Camino Glass* that denying contribution *enhances* the deterrent effect of the antitrust laws by preventing defendants from distributing the financial burden of a treble damages judgment. However, as the *Professional Beauty Supply* court noted, the argument can also be made that denying contribution *diminishes* the Law's deterrent effect by allowing some participants to avoid all responsibility for their wrongdoing. I agree with Judge Hanson's assessment that the arguments on either side of the deterrence question are at best inconclusive. *Professional Beauty Supply, Inc., supra*, 594 F.2d at 1189 (Hanson, J., dissenting in part).

The deterrence argument, therefore, is an inadequate reason for rejecting a rule designed to achieve fairness among parties guilty of no conscious wrongdoing.

Furthermore, even if one accepts the premise that a no-contribution rule has an increased deterrent effect on those contemplating anticompetitive activity, this is no reason for denying contribution to unintentional violators. As Assistant Attorney General Shenefield recently observed in testimony before a Senate subcommittee considering a proposed bill allowing contribution in price-fixing cases, [3] "[c]ontribution is most compelling where the tortious conduct is unintentional; *in such situations a lack of contribution would have no deterrent effect.*" [4] This position makes more sense than the court's conclusion that businesses will somehow "steer wide" of illegal activity which they never realized was illegal in the first place. Clearly, deterrence is a valid reason for denying contribution among those who *intentionally* violate the antitrust laws.

The court is also concerned that some businesses "may be encouraged to risk anticompetitive conduct secure in the knowledge that proof of illegal purpose is often impossible and that liability for illegal effects will be dissipated." Majority opinion at –, slip opinion at p. 420. The assumption that intentional violators will be able to pass themselves off as

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3. S. 1468, 96th Cong., 1st Sess. (July 9, 1979).

4. Testimony of Assistant Attorney General John Shenefield before Senate Subcommittee on Antitrust, Monopoly and Business Rights, June 8, 1979. Other writers agree that "denying contribution can consistently deter only willful lawbreakers; it will not inhibit many violations committed unintentionally or in response to economic coercion. Thus, the deterrence rationale provides at best a weak justification for blanket denial of contribution." Note, *supra*, 63 Cornell L.Rev. at 702-03; Restatement of Restitution, *supra*, at 386.

unwitting transgressors is inconsistent with the realities of the proposed contribution action. Any party seeking contribution will invariably be opposed by contribution defendants who have a vested interest in establishing that the contribution plaintiff was an intentional violator of the antitrust laws. Moreover, these contribution defendants, unlike many antitrust plaintiffs, will be in an excellent position to know whether the party was, in fact, an intentional wrongdoer. Under these circumstances few, if any, intentional tortfeasors will succeed in presenting themselves as unwitting transgressors.

In its second argument the court expresses concern that allowing contribution will make the lawsuit more complex and difficult to manage, thereby dissuading come plaintiffs from pursuing a legitimate cause of action. Although the authorities considering the question unanimously agree that permitting contribution does threaten the plaintiff's ability to control the size and scope of his lawsuit, [5] they disagree as to the trial court's ability to recognize and eliminate that threat. If is clear the Fed.R.Civ.P. 42(b) authorizes trial judges to order separate trials whenever a plaintiff is inconvenienced or prejudiced by a defendant's expansion of his suit. Relying on language from Judge Hanson's dissent in *Professional Beauty Supply*, the majority warns that the discretionary nature of the separation remedy may nevertheless dampen some plaintiff's enthusiasm about initiating an antitrust action.

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5. *Professional Beauty Supply, supra*, 594 F.2d 1184; *id* at 1190 (Hanson, J., dissenting in part); *El Camino Glass*, supra at 72,112; *Sabre Shipping Corp. v. American President Lines, Ltd.*, 298 F.Supp. 1339, 1346 (S.D.N.Y. 1969); Note, Contribution in Private Antitrust Suits, 63 Cornell L.Rev. 682, 700-01 (1978).

I simply cannot believe that the discretionary nature of the Rule 42(b) separate trials provision would discourage an antitrust plaintiff from seeking treble damages should the court recognize a right of contribution among unintentional violators. The district courts are certainly aware of the antitrust plaintiff's status as a private attorney general and of the important role played by the private damage action in enforcing the objectives of the antitrust laws. The special solicitude accorded these plaintiffs necessarily requires a liberal exercise of the separate trials provision. Realizing his favored position, the antitrust plaintiff is not likely to assume that the trial judge would deny separation and allow defendant to complicate the lawsuit or otherwise add to the private litigant's burden. Hence, the incentive to sue provided by the treble damages action is not jeopardized if contribution is allowed.

Although some unfairness to unintentional violators must be tolerated if antitrust law policy is thwarted by allowing contribution, I do not believe that the dangers envisioned by the majority withstand close scrutiny. Absent more convincing proof that a limited contribution rule would compromise the effectiveness of the antitrust laws, I would not force a defendant guilty of no conscious wrongdoing to bear total responsibility for the sins of many.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 78-1788

FILED DEC. 10, 1979
4:35 PM

D. C. Docket No. CA-7502820-"J"

WILSON P. ABRAHAM CONSTRUCTION CORPORATION, Plaintiff,

v.

TEXAS INDUSTRIES, INC. and Frank T. Dooley, Defendants.

* * * * *

TEXAS INDUSTRIES, INC., Third-Party Plaintiff-Appellant.

v.

RADCLIFF MATERIALS et al., Third-Party Defendants-Appellees.

Jahncke Service, Third Party Defendant

Appeal from the United States District Court
for the Eastern District of Louisiana

Before THORNBERRY, AINSWORTH and MORGAN,
Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern Distrrict of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that the third-party-plaintiff-appellant pay to the third-party-defendants-appellees the costs on appeal, to be taxed by the Clerk of this Court.

October 16, 1979

Morgan, Circuit Judge, concurring in part and dissenting in part.

ISSUED AS MANDATE: DEC. 7, 1979

DATE OF ENTRY: DEC. 26, 1979

APPENDIX C

MINUTE ENTRY
MITCHELL, J.
OCTOBER 4, 1977

FILED OCT. 5, 1977
4:58 PM

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

WILSON P. ABRAHAM CONSTRUCTION COMPANY	CIVIL ACTION
VERSUS	NO. 75-2820
TEXAS INDUSTRIES, INC., ET AL	SECTION "F"

This matter was submitted to the Court on a former date. After careful consideration of the applicable law, and of the briefs and arguments of counsel, the Court now rules.

IT IS ORDERED, ADJUDGED, AND DECREED that the motions of third-party defendants, OKC Dredging, Inc. (formerly Jahncke Services, Inc.), Radcliff Materials, Inc., and Jimco, Inc., to dismiss, be and the same are hereby GRANTED.

This complaint is filed under the Clayton Act to recover damages from defendants for their alleged violations of the Sherman Act. Plaintiff also alleges that defendants have violated the antitrust laws of the State of Louisiana. In March of 1977, the defendant, Texas Industries, Inc., filed third-party complaints against OKC Dredging (formerly Jahncke Services), Radcliff Materials, and Jimco, alleging them to be co-conspirators in relation to plaintiff's complaint.

All three motions to dismiss are based on the same premise - *i.e.*, there is no right to contribution or indemnity among coconspirators in a federal anti-trust case. All courts which have addressed this issue have decided in favor of movants' position. [1] Although we find third-party plaintiff's argument to be persuasive, we feel that the weight of authority dictates a contrary result.

Therefore, the motions are granted.

/s/ Lansing L. Mitchell

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1. *American Motor Inns, Inc. v. Holiday Inns, Inc.*, 521 F.2d 1230 (CA3-1975); *Walker Distributing Co. v. Lucky Lager Brewing Co.*, 323 F.2d 1 (CA9-1963), *appeal after remand*, 362 F.2d 1008 (CA9-196), *cert. denied*, 385 U.S. 976, 82 S.Ct. 507 (1967); *Sabre Shipping Corp. v. American President Lines*, 298 F.S. 1339 (S.D.N.Y.-1969); *Wainwright v. Kraftco Corp.*, 58 F.R.D. 9 (N.D. Ga.-1973).

NO. 79-1144

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

TEXAS INDUSTRIES, INC.,

Petitioner

VERSUS

RADCLIFF MATERIALS, INC., JIMCO, INC. and OKC DREDGING, INC.,

Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOINT APPENDIX

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Petition for Certiorari Filed January 24, 1980
Certiorari GRANTED November 3, 1980

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NO. 79-1144

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1980

Texas Industries, Inc.,

Petitioner

V.

Radcliff Materials, Inc., Jimco, Inc.
and OKC Dredging, Inc.,

Respondents

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

INDEX

Chronological List of Relevant Docket Entries iv

PAGE

Complaint of Wilson P. Abraham Construction Corporation (September 8, 1975) 1

Answer of Texas Industries, Inc. (October 22, 1975) 13

Texas Industries, Inc.'s First Set of Interrogatories to Plaintiff (October 30, 1975) 18

Plaintiff's Answers to First Set of Interrogatories (January 27, 1976) 20

Plaintiff's Amended Answers to Second Set of Interrogatories (September 16, 1976) 23

Third Party Complaint of Texas Industries, Inc. (March 2, 1977) 35

Supplemental Third Party Complaint of Texas Industries, Inc. (March 23, 1977) 38

Motion of OKC Dredging, Inc. to Dismiss (May 16, 1977) 40

Motion of Radcliff Materials, Inc. to Dismiss (August 19, 1977) 42

Motion of Jimco, Inc. to Dismiss (August 19, 1977) 44

Minute Entry Granting Motions of OKC Dredging, Inc., Radcliff Materials, Inc. and Jimco, Inc. to Dismiss (October 4, 1977) 46

PAGE

Judgment in Favor of Radcliff Materials, Inc., OKC Dredging, Inc., and Jimco, Inc. Dismissing Third Party Complaint (March 29, 1978) 48

Judgment of Fifth Circuit (December 26, 1979) 50

List of Counsel 52

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
9/8/75	1	COMPLAINT of Wilson P. Abraham Construction Corporation
10/22/75	8	ANSWER of Texas Industries, Inc.
10/30/75	9	Texas Industries, Inc.'s First Set of INTERROGATORIES to Plaintiff
1/27/76	18	Plaintiff's ANSWERS to First Set of Interrogatories
9/16/76	19	Plaintiff's AMENDED ANSWERS to Second Set of Interrogatories
3/2/77	25	Third Party COMPLAINT of Texas Industries, Inc.
3/23/77	27	Supplemental Third Party COMPLAINT of Texas Industries, Inc.
5/16/77	33	MOTION of OKC Dredging, Inc. to Dismiss
8/19/77	46	MOTION of Radcliff Materials, Inc. to Dismiss
8/19/77	47	MOTION of Jimco, to Dismiss
10/4/77	52	MINUTE ENTRY Granting Motions of OKC Dredging, Inc., Radcliff Materials, Inc. and Jimco, Inc. to Dismiss
3/29/78	58	JUDGMENT in Favor of Radcliff Materials, Inc., OKC Dredging, Inc., and Jimco, Inc. Dismissing Third Party Complaint

DATE	NR.	PROCEEDINGS
12/26/79	68	JUDGMENT of Fifth Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

WILSON P. ABRAHAM
CONSTRUCTION CORPORATION,

Plaintiff

VS.

TEXAS INDUSTRIES, INC., and FRANK T. DOOLEY.

CIVIL ACTION
NO. 75-2820
SECTION "F"

COMPLAINT

[filed U. S. District Court Eastern District of La. Sep. 8, '75, 2:09 PM]

Plaintiff, WILSON P. ABRAHAM CONSTRUCTION CORPORATION, a Louisiana corporation, by its attorneys, brings this civil action against the Defendants above named for treble the amount of damages suffered by it due to Defendants' violations of the antitrust laws of the United States and of the State of Louisiana, and, in support of its causes of action, alleges, upon information and belief, as follows:

I. JURISDICTION AND VENUE

1.1 This Complaint is filed, and the jurisdiction of this Court correspondingly invoked, under the authority of Section 4 of the Clayton Act (15 U. S. C. §15), to recover damages from the Defendants for their willful violations of Section 1 of the Sherman Act (15 U. S. C. §1).

1.2 Jurisdiction is further conferred, under the principles of pendent jurisdiction, with reference to Defendants' violations of the antitrust laws of the State of Louisiana. The claims herein asserted based upon federal questions (violations of federal antitrust laws) are asserted against the same Defendants with respect to which non-federal claims (violations of the antitrust laws of the State of Louisiana) are herein asserted.

1.3 The corporate Defendant maintains offices and transacts business within the boundaries of the State of Louisiana and within the boundaries of the Eastern District of Louisiana. The individual Defendant has transacted business with reference to the sale of ready-mix concrete within the State of Louisiana during the period of the violations herein alleged, is a resident of the State of Louisiana, and resides within the Eastern District.

1.4 Substantially all of the unlawful acts done pursuant to and in furtherance of Defendants' and their co-conspirators' combination and conspiracy to violate the antitrust laws of the United States and the State of Louisiana were planned, executed and enforced within the Eastern District. Further, the activities of all the co-conspirators involving interstate trade and commerce (as hereinafter more fully described) were and are being carried on, in substantial part, within the territory comprehended by this District.

II. DEFINITIONS AND DESIGNATIONS

2.1 For purposes of simplicity and clarity, certain designations and shorthand renditions will be utilized throughout this Complaint. As used herein, the following terms are described or defined as follows:

(a) "Ready-mix concrete": A mixture of cement and other materials, such as sand, stone and water, and,

at times, additives, which mixture is widely used in the construction and improvement of various types of structures and appurtenances;

(b) "Ready-Mix Concrete Supplier": A person, firm, corporation or other entity which is engaged in the business of producing and selling ready-mix concrete;

(c) "Target Area": That geographical area comprehended by or materially affected by the illegal activities and conspiracies of Defendants, or any of them, to violate the antitrust laws of the United States and the State of Louisiana, as hereinafter described, encompassing generally the New Orleans area;

(d) "New Orleans Area": The parishes of Orleans, Jefferson and St. Bernard in the State of Louisiana.

III. DESCRIPTION OF THE PARTIES

THE PLAINTIFF

3.1 The Plaintiff, Wilson P. Abraham Construction Corporation, is a corporation duly organized and existing under the laws of the State of Louisiana, maintaining its principal offices in the city of New Orleans. Plaintiff is engaged in the building of both residential and commercial structures. During the period of Defendants' violations of the antitrust laws, as hereinafter described, Plaintiff built various structures, including substantial residential developments, private roads and the like, within the State of Louisiana. In the course of such building activities, Plaintiff has made substantial purchases of ready-mix concrete from Defendant, Texas Industries, Inc., within the New Orleans area.

THE DEFENDANTS

3.2 The Defendant, Texas Industries, Inc. (hereinafter referred to as "Texas Industries"), which engages in the ready-mix concrete business in the New Orleans area through its division, Louisiana Industries, was organized and exists under the laws of the State of Delaware. Louisiana Industries has its principal place of business in New Orleans, Louisiana. During the period covered by this Complaint, Louisiana Industries, a ready-mix concrete supplier, produced and sold ready-mix concrete in the New Orleans area.

3.3 The Defendant, Frank T. Dooley (hereinafter referred to as "Dooley"), is a resident of New Orleans, Louisiana, and during the period covered by this Complaint was employed by Texas Industries as Vice-President and Regional Manager, New Orleans.

IV. NATURE OF TRADE AND COMMERCE

4.1 During the period covered by this Complaint, Defendant, Texas Industries, produced ready-mix concrete in the New Orleans Area, which it sold to Plaintiff based upon oral and written price quotations. Plaintiff used the ready-mix concrete in the construction, repair, alteration and improvement of commercial and residential structures, developments, subdivisions and the like.

4.2 Cement, a basic ingredient in the production of ready-mix concrete, represents approximately fifty per cent of the total cost of materials used to produce such concrete. Texas Industries orders and purchases cement on the basis of existing orders and anticipated demand for ready-mix concrete. A substantial part of the cement purchased by Texas Industries for use in the production of their ready-mix concrete is produced in states other than the State of Louisiana and is delivered by suppliers thereof to Texas Industries in response to spe-

cific orders placed by Texas Industries.

4.3 Texas Industries, therefore, acts as a conduit through which cement flows in a continuous, uninterrupted stream in interstate commerce from the states in which it is produced to ready-mix concrete production facilities maintained in the New Orleans area, where it is incorporated into ready-mix concrete and from there delivered to job sites.

4.4 Aggregate, sand and gravel, other major ingredients used in the production of ready-mix concrete, are ordered and purchased by Texas Industries on the basis of existing orders and anticipated demand for ready-mix concrete. Some of these ingregients (sic) purchased by Texas Industries for use in the production of their ready-mix concrete are produced or found in states other than the State of Louisiana and are delivered by suppliers thereof to Texas Industries in response to specific orders placed by these defendants.

4.5 The annual sales of ready-mix concrete in the New Orleans area are substantial. Plaintiff believes that sales of ready-mix concrete made by the co-conspirators, of which Texas Industries is one, pursuant to their conspiracies to fix prices of ready-mix concrete during the time period covered by this Complaint was in excess of $40,000,000.00.

4.6 There is, therefore, a continual and substantial movement of said ready-mix concrete in interstate commerce. Any restraint upon competition in production and sale of ready-mix concrete necessarily and directly affects interstate commerce.

V. VIOLATIONS OF FEDERAL ANTITRUST LAWS

5.1 Beginning in about mid 1968 and continuing thereafter until at least the time of filing of this Complaint (the exact dates being unknown to the Plaintiff), the Defendants Texas

Industries and Dooley entered into and engages in an unlawful combination and conspiracy in unreasonable restraint of the aforesaid interstate trade and commerce in violation of Section 1 of the Sherman Act, as amended (15 U. S. C. §1).

5.2 The aforesaid combination and conspiracy consisted of a continuing agreement, understanding and concert of action among the Defendants, Texas Industries and Dooley, and their co-conspirators to raise and stabilize the price of ready-mix concrete in the New Orleans area.

5.3 The illegal combination and conspiracy had, among others, the following effects:

(a) Price competition in the sale of ready-mix concrete in the New Orleans area was unreasonably restrained;

(b) Customers of Texas Industries and its co-conspirators in the New Orleans area were deprived of the opportunity to purchase ready-mix concrete in an open and competitive market; and

(c) Prices of ready-mix concrete were increased and the market stabilized in the New Orleans area.

FRAUDULENT CONCEALMENT

5.4 Plaintiff had no knowledge of the illegal combinations and conspiracies, or any of the violations of the antitrust laws of the United States, or of any facts which might have led to the discovery of same, until shortly after the indictment of the Defendants, Texas Industries, Dooley and their co-conspirators. Plaintiff could not have uncovered the existence of the illegal activities committed by Defendants Texas Industries and Dooley, and their co-conspirators, at an earlier date by the exercise of due diligence, inasmuch as their unlawful con-

spiracies and acts have been fraudulently and actively concealed.

VI. VIOLATIONS OF LOUISIANA ANTITRUST LAWS

6.1 The wrongful acts, combinations and conspiracies of Defendants alleged herein are each and all in violation of the Constitution and Statutes of the State of Louisiana, which prohibit, ***inter alia***, combinations, contracts and conspiracies in restraint of trade within the State of Louisiana (LSA -Const. Art. 19, Sect. 14, and LSA-R.S. 51:121 et seq.). All allegations contained herein relevant to these violations are adopted in aid hereof, and specifically the allegations of Section V of this Complaint. Such wrongful activities constitute an unreasonable restraint upon trade and commerce within the State of Louisiana, and the doctrine of pendent jurisdiction is invoked by plaintiff.

VII. INJURY TO PLAINTIFF

7.1 During the period of unlawful activities, as alleged, Plaintiff has been compelled to pay substantially higher prices in its building and construction activities utilizing said ready-mix concrete than would have been the case but for said illegal acts and courses of conduct committed and pursued by Defendants in flagrant disregard for the antitrust laws of the United States and the State of Louisiana.

7.2 During the period of said illegal activities, Plaintiff purchased ready-mix concrete from Texas Industries for which it paid $470,971.06. As the direct and proximate result of Defendants' illegal acts, Plaintiff has suffered substantial financial damages by virtue of illegal overcharges on said ready-mix concrete in a market devoid of free competition, aggregating to a sum in excess of $200,000.00 to Plaintiff's best estimate and belief, for all of which recovery is prayed.

7.3 Since the true amount of damages sustained as a result of said illegal over-charges is peculiarly within the province of the knowledge of Defendants Texas Industries and Dooley and their co-conspirators, Plaintiff reserves the right to amend this Complaint as to damages subsequent to completion of discovery processes herein.

VIII. BASES FOR EQUITABLE RELIEF

PERMANENT INJUNCTION

8.1 The allegations of Sections IV and V, ***infra***, are specicically incorporated hereunder for purposes of reference, as well as any other allegations contained herein which would support the intervention of the equitable powers of this Court.

8.2 While Plaintiff has a demonstrable legal remedy by virtue of its "treble-damage" claim, such legal remedy is incomplete and inadequate to provide whole relief and to protect Plaintiff from being again deprived of its right, and that of the public at large, to a free and competitive market in the sale of ready-mix concrete. First, the violations complained of are continuing in nature, and the prospect of successive damage actions to compense Plaintiff and to deter such wrongful conduct is patently an inadequate remedy in that, ***inter alia***, it does not provide a "speedy" and effective disposition to the injuries, and due to the protraction inherent in the nature of antitrust litigation, never makes the Plaintiff truly whole for the injuries sustained in the interim.

8.3 Accordingly, Plaintiff will suffer irreparable injury, and the interests of the public at large in a free and competitive market will be irreparably harmed, unless, upon final trial hereof, a permanent injunction is issued restraining Defendants from any continuation of the violations and offenses charged herein.

IX. ATTORNEYS' FEES

9.1 Because of the wrongful conduct of Defendants, and each of them, in their violations of the antitrust laws of the United States and the State of Louisiana, it has been necessary for this Plaintiff to retain the services of legal counsel to represent its interests and to prosecute its rights, and those of the class represented by Plaintiff herein. Upon final determination of this cause, Plaintiff prays that reasonable attorneys' fees and recovery of expenses be awarded counsel commensurate with the responsibilities assumed and benefits secured to Plaintiff.

X. INFORMATION AND BELIEF

10.1 Since the very nature of price-fixing practices are conspiratorial and covert, experience reveals that the facts of such wrongful acts are notoriously concealed. Accordingly, Plaintiff makes its allegations herein upon its best information and belief, as such pleading is authorized by the Federal Rules of Civil Procedure.

10.2 Plaintiff respectfully reserves its right to amend or correct its pleadings and to assert its allegations with more particularity subsequent to production of documents, the taking of depositions and the completion of other discovery processes authorized.

XI. DEMAND FOR JURY

11.1 Plaintiff respectfully enters its demand for trial by a jury of all claims and allegations asserted herein, pursuant to its right therefor under the Constitution of the United States and the Federal Rules of Civil Proceedure.

XII. RELIEF REQUESTED

12.1 WHEREFORE, upon these premises, Plaintiff, Wilson P. Abraham Construction Corporation, requests the following relief upon final trial hereof:

(I) That the alleged combinations and conspiracies between Defendants and their co-conspirators be adjudged and decreed to be in unreasonable restraint of interstate trade and commerce and in violation of Section 1 of the Sherman Act, and Article 19, Section 14, of the Constitution of the State of Louisiana as well as its statutes (LSA-R. S 121 et seq.);

(II) That actual damages sustained by Plaintiff be ascertained and adjudicated in the sum of Two Hundred Thousand Dollars ($200,000.00), or such other sum as is sustained by the evidence, whether greater or lesser;

(III) That judgment be entered against Defendants, jointly and severally, for treble the amount of actual damages suffered by Plaintiff in the sum of Six Hundred Thousand Dollars ($600,000.00), or such other sum as is sustained by the evidence, whether greater or lesser, pursuant to the authority of Section 4 of the Clayton Act (15 U. S. C. §15);

(IV) That judgment be entered against Defendants, jointly and severally, awarding Plaintiff all costs of Court and expenses of litigation herein incurred, together with reasonable attorneys' fees for the prosecution of this action, as required and authorized by Section 4 of the Clayton Act (15 U. S. C. §15);

(V) That judgment be entered against Defendants, jointly and severally, awarding Plaintiff recovery of moratory interest upon actual damages sustained from the dates of ascertainment thereof, together with interest upon the total judgment at the rate of six per cent (6%) per annum, until the same be paid;

(VI) That a final decree be entered permanently restraining and enjoining Defendants, their officers, employees, agents, privies and all persons or firms acting in concert with them, whether directly or indirectly, from continuing or pursuing those acts alleged herein as violations of the antitrust laws of the United States and the State of Louisiana; and

(VII) The granting of such other and further relief, whether in equity or at law, which is appropriate upon the premises.

Respectfully submitted,

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ATTORNEYS FOR PLAINTIFF,
Wilson P. Abraham Construction
Corporation

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

WILSON P. ABRAHAM CONSTRUCTION CORP.

VERSUS

TEXAS INDUSTRIES, INC., and FRAND T. DOOLEY

CIVIL ACTION
NO. 75-2820
SECTION "F"

ANSWER

[filed U. S. District Court Eastern District of La. Oct. 22, '75, 12:15 PM]

NOW INTO COURT through undersigned counsel, comes defendant, Texas Industries, Inc., for the purpose of answering the complaint filed herein, as follows:

FIRST DEFENSE

The complaint fails to state a cause of action upon which relief can be granted against Texas Industries, Inc.

SECOND DEFENSE

This Court lacks jurisdiction over the subject matter set forth in the complaint for the reason that the alleged action of Texas Industries, Inc. was not within the flow of interstate commerce and had no effect on interstate commerce.

THIRD DEFENSE

Alternatively, the complaint purportedly states a cause of

action that is barred by the four year statute of limitation provided in Title 15 U. S. C. §15(b) in that the cause of action accrued more than four years prior to the filing of this suit.

FOURTH DEFENSE

Further alternatively, plaintiff lacks standing to recovery for alleged antitrust violations from Texas Industries, Inc.

FIFTH DEFENSE

Texas Industries, Inc. answers the complaint paragraph by paragraph as follows:

I.

1.1 It is denied this Court has subject matter jurisdiction pursuant to the authorities set forth in this paragraph.

1.2 Pendent jurisdiction of the matters set forth herein is denied.

1.3 Denied except that it is admitted that Texas Industries, Inc. maintains offices and transacts business within the State of Louisiana and within the boundaries of the Eastern District of Louisiana.

1.4 It is denied that Texas Industries, Inc. committed any unlawful acts whatsoever and it is further denied that the activities of Texas Industries, Inc. involved interstate commerce.

II.

2.1 The allegations of plaintiff purportedly defining certain terms require no answer of this defendant.

III.

3.1 Denied for lack of sufficient information to justify a

belief therein.

3.2 Admitted.

3.3 Denied.

IV.

4.1 Denied for lack of sufficient information to justify a belief therein, it being further denied that Texas Industries, Inc. sold ready-mix concrete directly to plaintiff.

4.2 Denied.

4.3 Denied.

4.4 Denied.

4.5 It is denied that Texas Industries, Inc. is a co-conspirator.

Remaining allegations are denied for lack of sufficient information to justify a belief therein.

4.6 Denied.

V.

5.1 Denied.

5.2 Denied.

5.3 Denied.

5.4 Denied.

VI.

6.1 It is denied that defendant, Texas Industries, Inc., is guilty of any wrongful acts, combinations or conspiracys as alleged herein. The remaining allegations of this paragraph are denied.

VII.

7.1 Denied.

7.2 Denied.

7.3 Denied.

VIII.

8.1 Denied.

8.2 Denied.

8.3 Denied.

IX.

9.1 It is denied that defendant, Texas Industries, Inc., has been guilty of any wrongful conduct. Remaining allegations of this paragraph are denied.

X.

10.1 Denied.

10.2 Denied.

XI.

11.1 The allegations of this paragraph require no answer of this defendant.

XII.

12.1 It is denied that plaintiff is entitled to the relief requested herein.

WHEREFORE, defendant, Texas Industries, Inc., prays that the above and foregoing answer be deemed good and sufficient and that after due proceedings are had there be judgment rendered in its favor dismissing plaintiff's demands at its costs. Said defendant further prays for all general and equitable relief.

MONROE & LEMANN

Benj. R. Slater, Jr.
William J. Hamlin

/s/William J. Hamlin
1424 Whitney Building
New Orleans, Louisiana 70130
Telephone: 586-1900

[Certificate of Service omitted]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

WILSON P. ABRAHAM CONSTRUCTION CORPORATION

VERSUS

TEXAS INDUSTRIES, INC., and FRANK T. DOOLEY

CIVIL ACTION
NO. 75-2820
SECTION "F"

INTERROGATORIES TO PLAINTIFF, WILSON P. ABRAHAM CONSTRUCTION CORPORATION (FIRST SET)

[filed U. S. District Court Eastern District of La. Oct. 30, '75, 12:41 PM]

Defendant, Texas Industries, Inc., propounds the following interrogatories to plaintiff, Wilson P. Abraham Construction Corporation, to be answered under oath pursuant to Rule 33 of the Federal Rules of Civil Procedure:

INTERROGATORY NO. 1: In Paragraph 5.1 of your complaint, you allege that "Beginning in about mid-1968 and continuing thereafter until at least the time of filing this Complaint, . . .the Defendants Texas Industries and Dooley entered into and engaged in an unlawful combination and conspiracy and unreasonable restraint of the aforesaid interstate trade and commerce in violation of Section 1 of the Sherman Act." Please identify, by date, location, parties involved and description of occurrence, all overt acts of Texas Industries, Inc.

or Dooley that occurred after September 7, 1971 and that you contend constituted part of the said continuing unlawful combination and conspiracy.

INTERROGATORY NO. 2: Please identify and describe all facts on which you will rely to prove that Texas Industries and Dooley entered into and engaged in an unlawful combination and conspiracy, as alleged in Paragraph 5.1 of your complaint, that took place or continued after September 7, 1971.

INTERROGATORY NO. 3: Please describe fully all facts on which you will rely to prove that this Court has Sherman Act jurisdiction over the alleged unlawful combination and conspiracy described in Paragraph 5.1 of your complaint.

INTERROGATORY NO. 4: Please identify the co-conspirators you make reference to in Paragraph 4.5 and 5.2 of your complaint.

MONROE & LEMANN

Benj. R. Slater, Jr.
William J. Hamlin

/s/ William J. Hamlin
1424 Whitney Building
New Orleans, Louisiana 70130
Telephone: 586-1900

[Certificate of Service omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

WILSON P. ABRAHAM
CONSTRUCTION CORPORATION,

Plaintiff

VS.

TEXAS INDUSTRIES, INC., and
FRANK T. DOOLEY,

Defendants

CIVIL ACTION
NO. 75-2820
SECTION "F"

PLAINTIFF'S ANSWERS TO INTERROGATORIES
(FIRST SET)

[filed U. S. District Court Eastern District of La. Jan. 27, '76, 10:04 AM]

TO: Benjamin R. Slater, Jr., Esquire
William J. Hamlin, Esquire
MONROE & LEMANN
1424 Whitney Building
New Orleans, Louisiana 70130

COMES NOW Wilson P. Abraham Construction Corporation, Plaintiff herein, and files this, its Answers to Interrogatories (First Set), and in response thereto would state as follows:

Interrogatory No. 1

By virtue of the fact that any unlawful conspiracy is, by its

very nature, secret and covert, it is impossible for Plaintiff, at this stage of the proceedings, without resort to descovery, to set forth with specificity a detailed description of Defendants' acts occurring during the period in question.

Interrogatory No.. 2

The evidence currently known to Plaintiff at this time, without resort to discovery, is primarily circumstantial. The facts are that Defendants and other unnamed co-conspirators are still selling ready-mix concrete at a uniform price, and all attempts to obtain a lower or reduced price have been unsuccessful. Additionally, on bid jobs the concrete supplier closest to the job site has uniformly submitted, by a very small amount, the lowest bid for the job. Based on these facts, Plaintiff believes that the conspiracy to fix prices and allocate territory has continued to the present time.

Interrogatory No. 3

The primary facts conferring jurisdiction are set forth in Paragraphs 4.2, 4.3, 4.4 and 4.6 of the Complaint filed in this cause.

Interrogatory No. 4

(1) Jahncke Service, Incorporated.

(2) Jimco, Inc.

(3) Radcliff Materials, Inc.

(4) Herbert G. Jahncke, Sr.

(5) Edward N. Lennox

(6) James Schwartz

WILSON P. ABRAHAM CONSTRUCTION CORPORATION

/s/ Wilson P. Abraham
Wilson P. Abraham, President

[Jurat and Certificate of Service Omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

WILSON P. ABRAHAM CONSTRUCTION CORPORATION,

Plaintiff

VS.

TEXAS INDUSTRIES, INC., and FRANK T. DOOLEY,

Defendants

CIVIL ACTION
NO. 75-2820
SECTION "F"

PLAINTIFF'S AMENDED ANSWERS TO INTERROGATORIES (SECOND SET)

[filed U. S. District Court Eastern District of La. Sep. 16, '76, 10:06 AM]

TO: Benjamin R. Slater, Jr., Esquire
William J. Hamlin, Esquire
MONROE & LEMANN
1424 Whitney Building
New Orleans, Louisiana 70130

COME NOW Wilson P. Abraham Construction Corporation, Plaintiff herein, and files this, its Amended Answers to Interrogatories (Second Set), and in response thereto would state as follows:

INTERROGATORY NUMBER ONE:

State separately with respect to each ready-mix concrete transaction for which damages are sought in this action by plaintiff, the following:

(a) Name of concrete supplier;

(b) Name and street address of project where concrete was installed;

(c) Type of concrete:

1. Number of sacks of cement per cubic yard;

2. Minimum pounds per square inch breaking strength;

3. Other special features;

(d) Number of cubic yards of each type of concrete;

1. Specified for use in the project;

2. Actually used in the project;

(e) Commencement and ending dates on which concrete was delivered to the installation site;

(f) Precise nature of the project or structure into which ready-mix concrete purchased by you was incorporated or installed.

ANSWER TO INTERROGATORY NUMBER ONE:

(a) (i) Louisiana Industries, a division of Defendant Texas Industries, Inc., 5825 River Road, New Orleans, Louisiana.

(ii) The Ready Mix Companies, a division of Davis Industries, 9600 West Bank Expressway, Jefferson Parrish, (sic) Louisiana.

(iii) Drake Concrete Co. of Belle Chase, Inc., 103 Burmaster Street, Belle Chase, Louisiana

(iv) It is Plaintiff's belief that these are the only concrete suppliers from whom concrete was purchased, but if subsequent discovery should reveal additional sellers of concrete to plaintiff, plaintiff reserves the right to amend this answer.

(b) - (e) The name and street address of the projects where concrete was installed, the type and amount of concrete and the delivery dates may be derived from the documents previously produced for inspection and copying. On each invoice for the purchase of concrete, the location where such concrete was shipped, the person sold to, the invoice date, quantity, description, price and terms are designated. Additionally, attached to each invoice are route tickets for each delivery of concrete which comprises such invoice. Such route tickets are apparently prepared by the driver of the delivery truck and designated on such job ticket the date, the person sold to, the address delivered to, the quantity and type of concrete in the respective load, the truck number and in some instances, the time of day of the delivery for each truck load of concrete delivered. A representative copy of the invoices received from defendant is attached hereto as Exhibit "A". Attached hereto as Exhibit "B" is a representative copy of the route tickets.

The burden of extracting the information requested by this interrogatory is substantially the same for plaintiff as for defendants. Accordingly, plaintiff will make available such documents for the period requested at the offices of Steeg & O'Connor, Oil & Gas Bldg., New Orleans, Louisiana, at a date

or dates mutually convient to the parties during normal business hours pursuant to Rule 33(c), F. R. C. P.

(f) The ready-mix concrete purchases by Plaintiff were used primarily for residential conctruction purposes. The concrete was utilized to construct structural slabs, roadways, curbings, sidwalks, driveways, patios, porches and the like.

INTERROGATORY NUMBER TWO:

As to each such transaction state whether the concrete was:

(a) Purchased directly by plaintiff from the concrete supplier; or

(b) Purchased from the concrete supplier by a contractor other than plaintiff.

ANSWER TO INTERROGATORY NUMBER TWO:

All purchases of ready-mix concrete made by Plaintiff herein during the period relevant to this action were made directly from the concrete supplier.

INTERROGATORY NUMBER THREE:

If a contractor other than plaintiff purchased the concrete from the concrete supplier, state as to the contract for the work or construction in which concrete was one of the materials specified:

(a) The name and address of the contractor;

(b) Whether the contract for the project was awarded by plaintiff on the basis of sealed bids, evaluation of bids, price quotation, negotiations, or a combination thereof (designating the combination), and if none of the

foregoing, state what said basis was;

(c) Whether an estimate of the price or cost of the work contemplated by the contract was made, and if so:

1. The date such estimate was prepared;

2. The name, address and position or title of each individual who participated in the preparation of the estimate;

3. The estimated total price or cost of such work;

4. The estimated total price or cost of the concrete to be furnished pursuant to the contract, and the estimated unit price of each separately identified type of concrete;

(d) The date of the bid invitation for the project, and the last date upon which bids were to be submitted;

(e) The total dollar amount:

1. Of the lowest bid;

2. Of the successful bid;

3. Paid to the successful bidder;

(f) The name, address and position of each person acting on behalf of plaintiff who participated in evaluating the bids or quotations, in negotiating with respect to the contract, or in recommending or deciding as to whom the contract should be awarded;

(g) The date on which plaintiff awarded the contract for the project.

ANSWER TO INTERROGATORY NUMBER THREE:

Not applicable.

INTERROGATORY NUMBER FOUR:

If the concrete was purchased directly by plaintiff from the concrete supplier, state:

(a) The total dollar amount paid to the concrete supplier for such concrete;

(b) The name and address of the person who made such payment to the concrete supplier;

(c) The unit price for each type of such concrete:

1. As stated in the contract with the concrete supplier;

2. As actually paid to the concrete supplier;

(d) The name and address and position of each person acting on behalf of plaintiff who negotiated with the concrete supplier with respect to such contract;

(e) The date plaintiff and the concrete supplier agreed upon the price for the concrete;

(f) The date of the last payment by plaintiff to the concrete supplier for such concrete;

(g) Whether plaintiff received any reimbursement from anyone for any part of the payments to the concrete supplier, and if so, describe the amount, date and source of such reimbursement.

ANSWER TO INTERROGATORY NUMBER FOUR:

(a) Plaintiff estimates that it purchased approximately $1,000,000.00 worth of ready-mix concrete during the period in which the price of such concrete was not established by open competitive methods, but, instead, inflated pursuant to conspiratorial agreements among various concrete suppliers.

(b) Wilson P. Abraham Construction Corporation.

(c) To the best of plaintiff's knowledge and belief, the unit price for each type of concrete stated on the invoice received from the concrete supplier was the same as actually paid to the concrete supplier. Reference should be had to Exhibits "A", "C" and "E" attached hereto for representative copies of the invoices which supply the information requested by this portion of the interrogatory.

The burden of extracting the information requested by this interrogatory is substantially the same for plaintiff as for defendants. Accordingly, plaintiff will make available such documents for the period requested at the offices of Steeg & O'Connor, Oil & Gas Building, New Orleans, Louisiana, at a date or dates mutually convenient to the parties during normal business hours pursuant to Rule 33(c), F. R. C. P.

(d) (i) Wilson P. Abraham, President of Wilson P. Abraham Construction Corporation, 225 Barrone Street, Suite 103, New Orleans, Louisiana 70112; (ii) Edmund Thomas Blancher, Comptroller of Wilson P. Abraham Construction Corporation, 225 Barrone Street, Suite 103, New Orleans, Louisiana 70113; (iii) Wilmer Serpas, Jr., former Comptroller of Wilson O. Abraham Construction Corporation, current address unknown.

(e) Plaintiff has no independent recollection of the exact dates that the price he paid for the concrete was agreed on, but, the date on which the price was agreed on would be on or about

the date of actual delivery. The dates of actual delivery may be obtained from the route tickets which plaintiff has attached to the invoices and which are available for inspection and copying.

(f) Among the records previously produced by plaintiff herein are check stubs of plaintiff indicating the date upon which plaintiff paid for such concrete. Plaintiff did not disburse a check to the concrete supplier for each delivery of concrete, but instead would remit a payment to the concrete supplier for invoices received from that supplier. The burden of ascertaining the information requested by section (f) of this interrogatory will be the same on plaintiff as it is on defendant. Plaintiff has previously produced such records for inspection and copying by defendant and plaintiff will again make available such documents for the periord requested at the offies (sic) of Steeg & O'Connor, Oil & Gas Building, New Orleans, Louisiana, at a date mutually convenient to the parties during normal business hours pursuant to Rule 33(c), F. R. C. P.

(g) Plaintiff has not received any reimbursement for anyone for any part of the payment to the concrete supplier.

INTERROGATORY NUMBER FIVE:

Identify all documents relating to each such ready-mix concrete transaction.

ANSWER TO INTERROGATORY NUMBER FIVE:

The documents relating to each ready-mix concrete transaction by plaintiff has previously been produced for inspection and copying by defendants. Such documents will again be made available at a mutually convenient time for inspection and copying by defense counsel. The documents consist of invoices from concrete suppliers, examples of which are attached hereto as Exhibits "A", "C" and "E". Additionally, such documents consist of route tickets which have been attached to the

invoice copies, representative copies of which are attached hereto as Exhibits "B", "D" and "F", and such documents consist of check stubs indicating payment for concrete supplied, a representative copy of which is attached hereto as Exhibit "G".

INTERROGATORY NUMBER SIX:

Please state precisely what damages you claim to have suffered as a result of any actions of the alleged co-conspirators involving ready-mix concrete transaction you have participated in, including in your answer your method of calculating such damages as to each such ready-mix concrete transaction.

ANSWER TO INTERROGATORY NUMBER SIX:

The primary damage sustained by plaintiff herein is that, by virtue of the conspiratorial agreements among suppliers of ready-mix concrete the price paid by plaintiff for such concrete was substantially and arbitrarily inflated. Plaintiff did not pay a price for the product which was arrived at through normal competitive practices of businesses selling a conparable product. Plaintiff is unable to set forth a specific breakdown as to the exact measure of damage suffered by plaintiff on each purchase of ready-mix concrete, but would conservatively estimate that by virtue of the conspiracy and inflation of prices arising therefrom that the retail price of ready-mix concrete was unlawfully inflated by approximately 20%. As has been previously stated, Plaintiff purchased approximately $1,000,000.00 worth of ready-mix concrete during the period covered by this action and based upon such percentage of arbitrary increase arrives at damages of approximately $200,000.00.

INTERROGATORY NUMBER SEVEN:

If not already included in your answers to these interrogatories, please state the price actually paid by you for each unit

of ready-mix concrete you purchased, as a result of which price you contend you suffered damages.

ANSWER TO INTERROGATORY NUMBER SEVEN:

The price actually paid for each unit of ready-mix concrete has previously been included in these Answers to Interrogatories.

INTERROGATORY NUMBER EIGHT:

If you are claiming that, but for the alleged conspiracy of the defendants, you would have been able to purchase ready-mix concrete at a lower price than what you in fact paid, please state the unit price you contend you would have paid in each ready-mix concrete transaction but for the alleged conspiracy.

ANSWER TO INTERROGATORY NUMBER EIGHT:

At this stage of the litigation, Plaintiff is unable to set forth a specific price which it would have purchased ready-mix concrete, but for the illegal conspiracy. But, as set forth in answer to Interrogatory No. 6, it is Plaintiff's belief and estimation that the price of ready-mix concrete would have been at least wenty (sic.) percent (20%) less had it not been for the conspiracy practiced by Defendants and others.

INTERROGATORY NUMBER NINE:

Please state all facts on which you will rely to prove the unit price you actually paid for ready-mix concrete in connection with all ready-mix concrete transactions in which you participated and claim to have sustained damages.

ANSWER TO INTERROGATORY NUMBER NINE:

Plaintiff will primarily rely on invoices supplied by Defen-

dant and other concrete suppliers to prove the unit price actually paid for ready-mix concrete. Additionally, plaintiff may rely on documents to be obtained from defendant and upon oral testimony by employees of defendant secured by was of deposition.

INTERROGATORY NUMBER TEN:

Please state all facts on which you will rely to prove the unit price you contend you would have paid for ready-mix concrete in connection wit all ready-mix concrete transactions in which you participated and claim to have sustained damages.

ANSWER TO INTERROGATORY NUMBER TEN:

Plaintiff will prove the amount which should have been paid for ready-mix concrete by utilization of expert testimony. Such expert testimony will be based on an analysis of the the economic factors existing in the relevant market during the period of the conspiracy and the impact of the conspiracy on those economic factors.

INTERROGATORY NUMBER ELEVEN:

If it is your contention that the unit price of ready-mix concrete you purchased was increased as a result of the alleged conspiracy of the defendants, please state all facts on which you will rely to prove your contention that the alleged conspiracy caused such prices to increase.

ANSWER TO INTERROGATORY NUMBER ELEVEN

It is the best information and contention of Plaintiff that the following facts will prove that the conspiracy entered into by Defendant caused the price of ready-mix concrete to increase:

(1) That the Defendants herein met on a systematic basis, the exact dates, places and times of which Plaintiff is currently unaware, with themselves and other unnamed conspirators.

(2) At such meetings, the Defendants and the other unnamed conspirators arbitrarily inflated the price at which each of them would sell ready-mix concrete to the purchasing public.

(3) That the Defendants and other unnamed co-conspirators systematically divided the sales territory and allocated jobs among the participating conspirators.

(4) That the Defendants and other unnamed conspirators sold ready-mix concrete at the arbitrarily inflated price and refused to sell at a lower price.

(5) Additionally, due to the fact that plaintiff has yet to obtain discovery from defendants, the foregoing facts may not be all inclusive and plaintiff reserves the right to amend such answer should additional facts be obtained through the discovery process.

WILSON P. ABRAHAM CONSTRUCTION CORPORATION

By: /s/ Wilson P. Abraham
Wilson P. Abraham, President

[Jurat and Certificate of Service omitted]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

WILSON P. ABRAHAM CONSTRUCTION CORPORATION

VERSUS

TEXAS INDUSTRIES, INC. and FRANK T. DOOLEY

CIVIL ACTION
NO. 75-2820
SECTION "F"

THIRD–PARTY COMPLAINT

[filed U. S. District Court Eastern District of La. Mar. 2, '77, 4:20 PM]

With full reservation of all rights, averments and defenses set forth in its answer filed herein, defendant-third-party plaintiff, Texas Industries, Inc., respectfully represents that:

I.

Third-party defendants, Jahncke Services, Inc. and Jimco, Inc., are Louisiana corporations with their principal places of business within the City of New Orleans, Parish of Orleans, State of Louisiana.

II.

Third-party defendant, Radcliff Materials, Inc., is an Alabama corporation authorized to do and doing business within the State of Louisiana, Parish of Orleans and within the jurisdiction of this court.

III.

Plaintiff, Wilson P. Abraham Construction Corporation, has alleged in Paragraphs 4.5 and 5.2 of its complaint that, by virtue of violations of the antitrust laws by third-party plaintiff and certain co-conspirators, it has sustained certain injury, which allegations third-party plaintiff, Texas Industries, Inc., has denied and which denial is incorporated herein by reference.

IV.

In response to certain discovery interrogatories propounded by third-party plaintiff, plaintiff, Wilson P. Abraham Construction Corporation, has avered that the said co-conspirators include third-party defendants herein, namely, Radcliff Materials, Inc., Jahncke Service, Inc. and Jimco, Inc.

Third-party plaintiff continues to aver that this Court lacks subject matter jurisdiction of the matters set forth in the complaint of Wilson P. Abraham Construction Corporation, and that the cause of action purportedly stated therein by Wilson P. Abraham Construction Corporation is barred by the four year statute of limitations provided in Title 15 U. S. C. 15(b), and, further, with full reservation of all rights set forth in its answer herein, third-party plaintiff, Texas Industries, Inc., avers in the alternative that if the court determines that jurisdiction of the subject matter set forth in the original complaint filed herein is proper, and/or that Wilson P. Abraham Construction Corporation is otherwise entitled to recover from third-party plaintiff, which is denied, then third-party plaintiff, Texas Industries, Inc., avers that it is entitled to contribution towards any such recovery from its alleged co-conspirators, third-party defendants herein, as among joint tort feasors.

WHEREFORE, third-party plaintiff prays that the above and

foregoing third-party complaint be filed, that third-party defendants be duly served with a copy of the third-party complaint, the original complaint and third-party plaintiff's answer to the original complaint, and that after due proceedings are had that, in the event third-party plaintiff is cast in judgment in any amount to the original plaintiff, Wilson P. Abraham Construction Corporation, that third-party defendants be cast in judgment for contribution to said third-party plaintiff as among joint tort feasors.

MONROE & LEMANN

Benj. R. Slater, Jr.
William J. Hamlin

/s/William J. Hamlin
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Telephone: 586-1900
Attorneys for: Third-Party Plaintiff

[Service instructions omitted]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

WILSON P. ABRAHAM CONSTRUCTION CORPORATION

VERSUS

TEXAS INDUSTRIES, INC. and FRANK T. DOOLEY

CIVIL ACTION
NO. 75-2820
SECTION "F"

SUPPLEMENTAL THIRD PARTY COMPLAINT

[filed U. S. District Court Eastern District of La. Mar. 23, '77, 4:11 PM]

Third-party plaintiff, Texas Industries, Inc., repeats and realleges all allegations and reservations contained in its original third-party complaint as though set forth herein *in extenso*, and supplements said third-party complaint by adding a paragraph VI, as follows:

VI.

On information and belief, third-party defendant, Jahncke Services, Inc. is presently owned by OKC Dredging, Inc., a Louisiana corporation with its principal place of business within the Eastern District of Louisiana, who assumed any liabilities of Jahncke Services, Inc. in this action, and accordingly said OKC Dredging, Inc. should be made a third-party defendant herein.

WHEREFORE, third-party plaintiff prays that OKC Dredging, Inc. be served with the supplemental third-party complaint,

the third-party complaint, the original complaint of plaintiff, Wilson P. Ahraham Construction Corporation together with the answer thereto filed by Texas Industries, Inc., and that after due proceedings are had that, in the event third-party plaintiff is cast in judgment in any amount to the original plaintiff, Wilson P. Abraham Construction Corporation, that OKC Dredging, Inc. and the other third-party defendants previously named herein be cast in judgment for contribution to said third-party plaintiff as among joint tort feasors.

MONROE & LEMANN
Benj. R. Slater, Jr.
William J. Hamlin

/s/William J. Hamlin
1424 Whitney Building
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ATTORNEYS FOR THIRD-PARTY
PLAINTIFF

[Service instructions omitted]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

WILSON P. ABRAHAM
CONSTRUCTION CORP.

VERSUS

TEXAS INDUSTRIES, INC. and
FRANK T. DOOLEY

CIVIL ACTION
NO. 75-2820
SECTION "F"

MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

[filed U. S. District Court Eastern District of La. May 16, "77, 4:26 PM]

OKC Dredging, Inc. (OKC), third party defendant, moves for an order dismissing the third party complaint of Texas Industries, Inc. against OKC insofar as Texas Industries seeks contribution with respect to its liability under the federal antitrust laws because the third party complaint fails to state a claim against OKC upon which relief can be granted for the reasons set forth in the memorandum accompanying this motion.

Respectfully submitted,

/s/Ewell P. Walther, Jr.
Ewell P. Walther, Jr.
Of
STONE, PIGMAN, WALTHER,

Wittmann & Hutchinson
1000 Whitney Building
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Telephone (504) 581-3200
Attorneys for OKC Dredging, Inc.

[Certificate of Service omitted]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

WILSON P. ABRAHAM CONSTRUCTION CORPORATION

VERSUS

TEXAS INDUSTRIES, INC. and FRANK T. DOOLEY

VERSUS

OKC DREDGING, INC., JIMCO, INC. and RADCLIFF MATERIALS, INC.

CIVIL ACTION
NO. 75-2820
SECTION "F"

MOTION OF THIRD-PARTY DEFENDANT RADCLIFF MATERIALS, INC. TO DISMISS PURSUANT TO RULE 12(b)(6)

[filed U. S. District Court Eastern District of La. Aug. 19, '77, 3:53 PM]

NOW INTO COURT, through undersigned counsel, comes Radcliff Materials, Inc., named a third-party defendant herein, and respectfully moves the Court to dismiss the third-party complaint of Texas Industries, Inc. pursuant to Rule 12(b)(6), FRCP, for failure to state a claim upon which relief can be granted, on the ground, that there is no right of contribution among alleged antitrust co-conspirators as a matter of law.

The reasons in support of this motion and the authorities relied upon by movant are set forth in the memorandum submitted herewith.

LEMLE, KELLEHER, KOHLMEYER & MATTHEWS

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Attorneys for Third-Party Defendant
Radcliff Materials, Inc.

[Certificate of Service omitted]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

WILSON P. ABRAHAM CONSTRUCTION CORPORATION

VERSUS

TEXAS INDUSTRIES, INC. and FRANK T. DOOLEY

VERSUS

OKC DREDGING, INC., JIMCO, INC. and RADCLIFF MATERIALS, INC'

CIVIL ACTION
NO. 75-2820
SECTION "F"

MOTION OF THIRD-PARTY DEFENDANT JIMCO, INC. TO DISMISS PURSUANT TO RULE 12(b) (6)

[filed U. S. District Court Eastern District of La. Aug. 19, '77, 4:34PM]

NOW INTO COURT comes Jimco, Inc., named a third-party defendant herein, and moves the court to dismiss the third-party complaint of Texas Industries, Inc. pursuant to FRCP rule 12(b) (6) for failure to state claim upon which relief can be granted, on the ground that there is no right of contribution among alleged anti-trust co-conspirators as a matter of law.

CHAFFE, McCALL, PHILLIPS,
TOLER & SARPY

By: /s/ James A. Babst
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[Certificate of Service omitted]

MINUTE ENTRY
MITCHELL, J.
OCTOBER 4, 1977

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

WILSON P. ABRAHAM
CONSTRUCTION COMPANY

VERSUS

TEXAS INDUSTRIES, INC., ET AL

CIVIL ACTION
NO. 75-2820
SECTION "F"

This matter was submitted to the Court on a former date. After careful consideration of the applicable law, and of the briefs and arguments of counsel, the Court now rules.

IT IS ORDERED, ADJUDGED, AND DECREED that the motions of third-party defendants, OKC Dredging, Inc. (formerly Jahncke Services, Inc.), Radcliff Materials, Inc., and Jimco, Inc., to dismiss, be and the same are hereby GRANTED.

This complaint is filed under the Clayton Act to recover damages from defendants for their alleged violations of the Sherman Act. Plaintiff also alleges that defendants have violated the antitrust laws of the State of Louisiana. In March of 1977, the defendant, Texas Industries, Inc., filed third-party complaints against OKC Dredging (formerly Jahncke Services), Radcliff Materials, and Jimco, alleging them to be co-conspirators in relation to plaintiff's complaint.

All three motions to dismiss are based on the same premise-

i. e., there is no right to contribution or indemnity among co-conspirators in a federal anti-trust case. All courts which have addressed this issue have decided in favor of movants' position. 1/ Although we find third-party plaintiff's argument to be persuasive, we feel that the weight of authority dictates a contrary result.

Therefore, the motions are granted.

/s/ Lansing L. Mitchell

1/ *American Motor Inns, Inc. v. Holiday Inns, Inc.*, 521 F. 2d 1230 (CA 3-1975); *Walker Distributing Co. v. Lucky Lager Brewing Co.*, 323 F. 2d 1 (CA9-1963), *appeal after remand*, 362 F. 2d 1008 (CA9-196), *cert. denied*, 385 U. S. 976, 82 S. Ct. 507 (1967); *Sabre Shipping Corp. v. American President Lines*, 298 F. S. 1339 (S.D.N.Y. - 1969); *Wainwright v. Kraftco Corp.*, 58 F.R.D. (N.D. Ga. - 1973).

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

WILSON P. ABRAHAM CONSTRUCTION CORPORATION

VERSUS

TEXAS INDUSTRIES, INC., and FRANK T. DOOLEY

CIVIL ACTION
NO. 75-2820
SECTION "F"

JUDGMENT

[filed U. S. District Court Eastern District of La. Mar 29, '78, 1:57 PM]

Considering the direction of the Court as to entry of judgment; accordingly:

IT IS ORDERED, ADJUDGED, AND DECREED that there be judgment in favor of third-party defendants, Radcliff Materials, Inc., OKC Dredging, Inc., and Jimco, Inc., and against third-party plaintiff, Texas Industries, Inc., dismissing the third-party complaint against these third-party defendants, with prejudice, and at the third-party plaintiff's costs.

New Orleans, Louisiana, this 29th day of March, 1978.

/s/ Nelson B. Jones
NELSON B. JONES. Clerk of Court

APPROVED AS TO FORM:

/s/ Lansing L. Mitchell
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
No. 78-1788

[filed U. S. District Court Eastern District of La. Dec. 10, '79, 4:35 PM]

D. C. Docket No. CA-7502820 - "J"

WILSON P. ABRAHAM CONSTRUCTION COMPANY

Plaintiff,

v.

TEXAS INDUSTRIES, INC. and Frank T. Dooley,

Defendants.

TEXAS INDUSTRIES, INC.,
Third-Party Plaintiff-Appellant,

v.

RADCLIFF MATERIALS et al.,
Third-Party Defendants-Appellees,

Jahncke Service,
Third-Party Defendant.

Appeal from the United States District Court for the Eastern District of Louisiana

Before THORNBERRY, AINSWORTH and MORGAN, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that the third-party-plaintiff-appellant pay to the third-party-defendants-appellees the costs on appeal, to be taxed by the Clerk of this Court.

October 16, 1979

Morgan, Circuit Judge, concurring in part and dissenting in part.

ISSUED AS MANDATE:
Dec. 7 1979

DATE OF ENTRY Dec 26 1979

A true copy
Test: GILBERT F. GANUCHEAU
Clerk, U. S. Court of Appeals, Fifth Circuit

By /s/ Brenda Hauck
Deputy

New Orleans, Louisiana Dec 7 1979

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Supreme Court, U. S.
FILED
FEB 22 1980
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-1144

TEXAS INDUSTRIES, INC.,

Petitioner

vs.

RADCLIFF MATERIALS, INC., JIMCO, INC., and OKC DREDGING, INC.,

Respondents

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TABLE OF CONTENTS

PAGE

TABLE OF CASES AND AUTHORITIES ii

ARGUMENT. 2

CONCLUSION 9

CERTIFICATE OF SERVICE. 11

TABLE OF CASES AND AUTHORITIES

PAGE

Wilson P. Abraham Construction Corp. v. Texas Industries, Inc., No. 75-2820 (E.D. La. 1977), *aff'd* 604 F.2d 897 (5th Cir. 1979). 3

Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179 (8th Cir. 1979). 3,4,6,7

Olson Farms, Inc. v. Safeway Stores, Inc., 1977-2 Trade Cas. ¶61,698 (D. Utah), *aff'd*, 1979-2 Trade Cas. ¶62,995 (10th Cir. 1979). 3,5

In re Beef Industry Antitrust Litigation, M.D.L. No. 248 (N.D. Tex. 1978), *aff'd*, 607 F.2d 167 (5th Cir. 1979). 3

In re Corrugated Container Antitrust Litigation, 1979-1 Trade Cas. ¶62,689 (S.D. Tex.), *aff'd per curiam*, 606 F.2d 319 (5th Cir. 1979) 3

In re Fine Paper Antitrust Litigation, M.D.L. No. 223 (E.D. Pa. 1979). 3

Alabama v. Blue Bird Body Co., No. 75-23-N (M.D. Ala. 1979) 3

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In re Ampicillin Antitrust Litigation, 82 F.R.D. 647 (D.D.C. 1979). 3

El Camino Glass v. Sunglo Glass Co., 1977-1 Trade Cas. ¶61,533 (N.D. Cal. 1976). 3

TABLE OF CASES AND AUTHORITIES (continued)

PAGE

Labbee v. Wm. Wrigley & Co., No. 4029 (W.D. Wash. 1974) 3

Sabre Shipping Corp. v. American President Lines, Ltd., 298 F. Supp. 1339 (S.D.N.Y. 1969) 3

Report of the Committee on the Judiciary, United States Senate, on S. 1468, together with Supplemental Views, S. Rep. No. 96-428, 96th Cong., 1st Sess. (1979) 2

R. STERN AND E. GRESSMAN, SUPREME COURT PRACTICE (5th ed. 1978) 8,9

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

No. 79-1144

TEXAS INDUSTRIES, INC.,

Petitioner

vs.

RADCLIFF MATERIALS, INC., JIMCO, INC., and OKC Dredging, INC.,

Respondents

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Respondents herein respectfully request this Court to deny the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on December 26, 1979.

MAY IT PLEASE THE COURT:

Petitioner Texas Industries, Inc. correctly asserts that there is but a single question presented by the instant petition for a writ of certiorari: "Whether a defendant in a Federal antitrust case may seek contribution." Petitioner's brief, page 2. Respondents Radcliff Materials, Inc., Jimco, Inc. and OKC Dredging, Inc. respectfully submit that the statement of the question itself demonstrates the inappropriateness of its review by this Honorable Court. *This very question* is presently being debated on the floor of Congress. Dedication of a portion of this Court's strained resources to consideration of an issue which is at the same time being squarely addressed by Congress would not only be patently wasteful, but would also be contrary to a tradition of deference which the judicial branch has accorded the legislative branch of government on this issue.

Legislation creating a cause of action for contribution in antitrust cases was introduced in Congress in May of 1979. A favorable report on this legislation was rendered by the Judiciary Committee of the United States Senate in November of 1979. [1] The issue of whether such a cause of action should be created, and the issue of what its scope should be if it were created, are now being considered on the floor of Congress. That is where consideration of these issues belongs, as the courts which have dealt with them have repeatedly observed.

The decision of the Fifth Circuit Court of Appeals in the instant case is illustrative. Judge Thornberry's opinion begins

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1. Report of the Committee on the Judiciary, United States Senate, on S. 1468, together with Supplemental Views, S. Rep. No. 96-428, 96 Cong., 1st Sess. (1979).

by noting that an unbroken line of federal cases had held there is no right of contribution among alleged antitrust coconspirators. [2] Then in February of 1979, a divided Eighth Circuit panel held for the first time that an antitrust defendant could, under certain circumstances, be entitled to contribution from a coconspirator not sued in the main demand. *Professional Beauty Supply v. National Beauty Supply*, 594 F.2d 1179 (8th Cir. 1979) [hereinafter *Professional Beauty*]. The Fifth Circuit rejected the arguments advanced by the majority in *Professional Beauty*, and concluded that any new rule should be the product of legislative action rather than judicial action:

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2. Respondents are aware of the following cases that have so held: *Wilson P. Abraham Construction Corp. v. Texas Industries, Inc.*, No. 75-2820 (E.D. La. 1977), *aff'd*, 604 F.2d 897, *en banc rehng. denied*, 608 F.2d 524 (5th Cir. 1979); *Olson Farms, Inc. v. Safeway Stores, Inc.*, 1977-2 Trade Cas. ¶61,698 (D. Utah), *aff'd*, 1979-2 Trade Cas. ¶62,995, *en banc rehng. granted* (10th Cir. 1979); *In re Beef Industry Antitrust Litigation*, M.D.L. No. 248 (N.D. Tex. 1978), *aff'd*, 607 F.2d 167, *en banc rehng. denied* (5th Cir. 1979); *In re Corrugated Container Antitrust Litigation*, 1979-1 Trade Cas. ¶62,689 (S.D. Tex.), *aff'd per curiam*, 606 F.2d 319 (5th Cir. 1979); *In re Fine Paper Antitrust Litigation*, M.D.L. No. 323 (E.D. Pa. 1979); *Alabama v. Blue Bird Body Co.*, No. 75-23-N (M.D. Ala.), *appeal docketed*, No. 79-2667 (5th Cir. 1979); *Hedges Enterprises v. Continental Group, Inc.*, 1979-1 Trade Cas. ¶62,717 (E.D. Pa. 1979); *In re Ampicillin Antitrust Litigation*, 82 F.R.D. 647 (D.D.C. 1979); *El Camino Glass v. Sunglo Glass Co.*, 1977-1 Trade Cas. ¶61,533 (N.D. Cal. 1976); *Labbee v. Wm. Wrigley & Co.*, No. 4029 (W.D. Wash. 1974); *Sabre Shipping Corp. v. American President Lines, Ltd.*, 298 F. Supp. 1339 (S.D.N.Y. 1969).

> "Our decision in this case is certainly subject to reasonable contrary arguments. In this area of interstitial lawmaking, however, to forge a new rule with questionable benefits and such possible detriments is a bad practice. Those aggrieved by this decision always have recourse to Congress, a forum better suited to evaluation of the competing interests and policies involved. In the absence of more compelling arguments in favor of contribution, this court is reluctant to create such a right as a matter of federal common law."
>
> 604 F.2d at 906.

The wisdom of the Fifth Circuit's approach is apparent from the different views expressed on just one of the many policy questions raised by the contribution issue: does the rule barring contribution increase the deterrent effect of the anti-trust laws, or decrease it? The Fifth Circuit accepted prevailing economic theory to the effect that "business managers, particularly in larger organizations, are generally 'risk averse' - - that is, they are deterred more by the slight prospect of a large loss than by the strong prospect of a small loss," and concluded the possibility of sole liability has an enhanced deterrent effect. 604 F.2d at 901. The majority opinion in the Eighth Circuit's *Professional Beauty* decision took the opposite view:

> "We believe that the question of deterrence actually cuts both ways and on balance a rule allowing contribution is actually a greater deterrent."
>
> 594 F.2d at 1185.

And Judge Hanson's dissenting opinion in *Professional Beauty* took the middle course:

> "To me the arguments on either side of the deterrence question are inconclusive and as a result I find deterrence of potential violators insufficient as a basis on which to predicate a new rule permitting contribution."
>
> 594 F.2d at 1189.

The broad spectrum of opinion on that question alone, and the conflicting economic arguments that can be advanced in aid of virtually every shading in the spectrum, support the Fifth Circuit's refusal to alter the rule barring contribution in the absence of legislative action.

The most recent appellate pronouncement on the contribution issue emanated from the Tenth Circuit in *Olson Farms, Inc. v. Safeway Stores, Inc.*, 1979-2 Trade Cas. ¶62,995, *en banc rehearing granted* (10th Cir. 1979) [hereinafter *Olson*], and it followed the Fifth Circuit's lead in deferring to Congress. *Olson* was decided in November of 1979, at a time when its panel had the benefit of both the Fifth Circuit and the Eighth Circuit opinions on contribution, and was also aware of the introduction of legislation in Congress on this issue. 1979-2 Trade Cas. at 79,703, fn. 13. The Court in *Olson* held that Congress, and not the judiciary, is the appropriate forum for debating the merits of contribution:

> "Before entering such a complex policy thicket, but recognizing a possible exception in the case of an unintentional violator, we believe this court should await a clear signal, at least, from the legislative branch of our government on the matter. Certainly, the Congress, assisted by the resources of the executive branch, is in a far superior and

> more appropriate position to gauge the impact on observance and enforcement of the antitrust laws from contribution and its various facets of implementation."
>
> 1979-2 Trade Cas. at 79,704 (footnote omitted).

Whether even the panel in *Professional Beauty* - - the only antitrust case that has ever permitted any form of contribution - - would have chosen to enter this "complex policy thicket," had it known what the Tenth Circuit knew when it decided *Olson,* is problematic. *Professional Beauty* was decided in February of 1979, and legislation on contribution was not introduced in Congress until May of that year. The majority opinion in *Professional Beauty* observed that the contribution issue had arisen "infrequently" in the case law, and was therefore "unlikely to spur immediate congressional action." 594 F.2d at 1184.

Petitioner in this case relies heavily on *Professional Beauty,* contending that it creates a split in the circuits which this Court must resolve. But petitioner neglects to point out that, even putting aside the special context in which *Professional Beauty* arose, [3] there has been a critical change in circum-

---

3. The claim in *Professional Beauty* grew out of a situation very different from that presented by the instant case. *Professional Beauty* involved an attempted monopolization claim under §2 of the Sherman Act, asserted by a terminated distributor of beauty supplies against another distributor of beauty supplies. The plaintiff, Professional Beauty Supply, Inc., alleged that the defendant, National Beauty Supply, Inc., induced La Maur Inc., the supplier of both distributors, to

(footnote 3 continued on following page)

stances since the rendering of that decision. The Court in

(footnote 3 continued)
terminate Professional as a La Maur distributor. Professional did not name La Maur as a defendant. Thereafter, National filed a third party complaint against La Maur, claiming that it had no control over La Maur's decision to terminate Professional, and that Professional had been persuaded not to name La Maur as a defendant because of La Maur's decision to renew Professional's franchise. The Eighth Circuit expressed concern over the possibility that "a large or powerful tortfeasor" may have "sufficient economic influence to prevent a plaintiff from including it as a defendant", and remanded the case for "further factual development" of National's allegations. The court stated that:

> "We do not hold that contribution is available to all violators of the antitrust laws, regardless of the flagrancy of the conduct of the party seeking contribution. The decision of whether a particular party is entitled to contribution is best left to the trier of fact upon consideration of all of the circumstances of a case . . . . At this stage of the proceedings contribution in favor of National is a possibility."
>
> 594 F.2d at 1186.

By contrast, the instant case involves no assertion of economic coercion or collusion. Plaintiff Wilson P. Abraham Construction Corporation sued defendant Texas Industries, Inc. for allegedly participating in a conspiracy to fix prices on concrete. Abraham did not sue the others claimed to be involved in this conspiracy because it had only purchased concrete from Texas Industries. Thus if Abraham paid any illegal overcharges on concrete, then all such overcharges would have been received by Texas Industries. In an attempt to cut its losses in the event of a recovery by Abraham, Texas Industries filed a third party complaint seeking contribution from respondents herein.

Professional Beauty assumed congressional action on contribution was unlikely. Now, one year later, contribution legislation is presently pending in the Senate. Mr. Justice Harlan observed more than twenty years ago that:

> " . . . [A] conflict of decisions may safely be relied on as a ground for certiorari only in instances where it is clear that the conflict is one that can be effectively resolved only by the prompt action of the Supreme Court." [4]

Where, as here, congressional action is underway with respect to the very subject which petitioner claims presents a conflict among the circuits, it is manifest that the claimed conflict, even if it exists, is not dependent upon this Court alone for its resolution. Indeed, any contribution decision handed down by this Court under these circumstances could well be impaired or even rendered nugatory by legislation.

Burgeoning caseloads at all levels of the federal judiciary have led to a substantial increase in the number of applications for writs of certiorari. As the number of applications has grown, there has been a corresponding decrease in the percentage of cases in which this Court can grant certiorari:

---

4. Mr. Justice Harlan, *Some Aspects of the Judicial Process in the Supreme Court of the United States*, 33 Australian L. J. 108 (1959), *cited in* R. STERN AND E. GRESSMAN, SUPREME COURT PRACTICE 266 (5th ed. 1978).

> "Whereas the percentage of grants was often said in the past to be in the 10 to 15 percent range, the overall percentage of grants (including the summary dispositions) has now declined to around 6 percent." [5]

Statistics compiled by the Clerk of Court for the Supreme Court's most recent term ended October 1, 1979 show a total of 3,945 certiorari petitions filed during the term. Of that total, 3,672 were denied, 110 were decided summarily, and only 163 were granted and set for oral argument.

Respondents respectfully suggest that it would be inexpedient to place the instant case among the very select number of cases in which certiorari is granted, when it is likely that pending legislation could turn any disquisition by this Court on the contribution issue into an academic exercise.

CONCLUSION

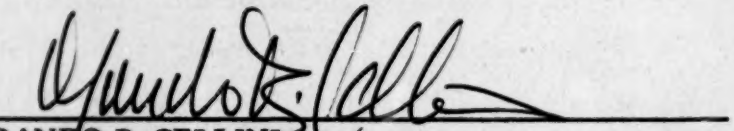
The Fifth Circuit correctly concluded in the instant case that the decision to create a new cause of action for contribution in antitrust cases should be left to Congress, "a forum better suited to evaluation of the competing interests and policies involved." 604 F.2d at 906. Congress is now debating this very question. Deference to the work of Congress, and recognition of the impact this work is likely to have on any Court decision on contribution, militate strongly against the issuance of a writ of certiorari in this case. Respondents there-

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5. R. STERN AND E. GRESSMAN, SUPREME COURT PRACTICE 260 (5th ed. 1978).

fore urge the Court to deny the petition filed herein forthwith.

Respectfully submitted,



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Dated February 21, 1980

CERTIFICATE OF SERVICE

Undersigned counsel of record for Respondent Radcliff Materials, Inc. hereby certifies that, on February 21, 1980, three copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit were served upon all counsel of record in this case, by hand delivery or by mail, in compliance with the provisions of Rules 33.1 and 33.3(b) of the Rules of Practice of the Supreme Court of the United States.



DANDO B. CELLINI

NO. 79-1144

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

TEXAS INDUSTRIES, INC.,

Petitioner

VERSUS

RADCLIFF MATERIALS, INC., JIMCO, INC.
and OKC DREDGING, INC.

Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER
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NO. 79-1144

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1980

Texas Industries, Inc., 1/

Petitioner

V.

Radcliff Materials, Inc., Jimco, Inc.
and OKC Dredging, Inc.

Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER 2/
TEXAS INDUSTRIES, INC.

QUESTION PRESENTED

Whether a defendant in a Federal Antitrust case may seek contribution.

1/ The plaintiff in this matter, Wilson P. Abraham Construction Corporation, is not a party to the matter before the Court.

2/ In accord with Rule 28.1 of this Court, the following lists subsidiaries (other than those wholly owned) and affiliates of Texas Industries, Inc.:

Chaparral Steel Company

TABLE OF CONTENTS

PAGE

Question Presented i

Table of Authorities iv

Statutory Provisions 1

Opinions Below 1

Jurisdiction 2

Statement of the Case 2

History of the Litigation and Course of Proceedings 2
Disposition in District Court 3
Disposition in the Fifth Circuit 4

Summary of Argument 5

Argument 7

I. The Court Has The Power to Recognize Contribution Under The Federal Antitrust Laws 7

II. For Reasons of Fundamental Fairness, Contribution Should be Recognized Under The Antitrust Laws 11

III. Contribution Furthers The Basis Objectives of The Antitrust Laws 15

A. Contribution Promotes Deterrence 16

TABLE OF CONTENTS CONTINUED

PAGE

B. Contribution Ensures That No One Keeps The Fruits of His Illegal Acts 18

C. Contribution Ensures Good Faith Settlements 18

IV. Contribution Ensures Availability of Remedies to Promote Public Policy of The Antitrust Laws 19

V. Apportionment of Liability Under A Rule Recognizing Contribution 22

A. Antitrust Violators Are Solidarily Liable 23

B. Apportionment to Promote Deterrence 23

C. Effect on Manageability of Litigation 25

D. Effect on Settlement 26

VI. Contribution Should Be Available Among Both Intentional and Unintentional Violators of The Antitrust Laws 28

Conclusion 30

TABLE OF CASES AND OTHER AUTHORITIES

Cases: PAGE

City of Atlanta v. Chattanooga Foundry & Pipe Works, 127 F. 23, (6th Cir. 1906), *affirmed*, 203 U. S. 390 (1906) 10

Cooper Stevedoring Co., Inc. v. Fritz Kopke, Inc., 417 U. S. 106, 94 S. Ct. 2174 (1974) 13

Cort v. Ash, 422 U. S. 66 (1975) 10

Edmonds v. Compagnie Generale Transatlantique, 443 U. S. 256, 271-72, n. 30 (1979) 13

Glus v. G. C. Murphy Co., 629 F. 2d 248 (3rd Cir. 1980) 14

Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U. S. 481 (1968) 18

Heizer Corp. v. Ross, 601 F. 2d 330 (7th Cir. 1979) 13

Illinois Brick Co. v. Illinois, 431 U. S. 720 (1977) 15

Illinois v. City of Milwaukee, Wisconsin, 406 U. S. 91 (1972) 8

Kiefer-Stewart Co. v. Seagram & Sons, 340 U. S. 211 (1951) 20

Kohr v. Allegheny Airlines, Inc., 504 F. 2d 400 (7th Cir. 1974), *cert. den.* 421 U. S. 978 (1975) 14

TABLE OF CASES AND OTHER AUTHORITIES CONTINUED

PAGE

Lawlor v. National Screen Service Corp., 349 U. S. 322 (1955), 75 S. Ct. 865 (1955) 10, 23, 29

McLain v. Real Estate Board of New Orleans, Inc., 100 S. Ct. 502 (1980) 28

National Society of Professional Engineers v. United States, 435 U. S. 679 (1978) 9

Northwestern Oil Co. v. Socony-Vacuum Oil, Co., 138 F. 2d 967 (7th Cir. 1944), *cert. den.* 321 U. S. 792 (7th Cir. 1944) 29

Olson Farms, Inc. v. Safeway Stores, Inc., 1977-2 Trade Cases 61,698 (D. Utah 1977), *affirmed*, 1979-2 Trade Cases (CCH) 62,995 (10th Cir. 1979), *en banc rehearing granted and pending* (Dec. 27, 1979) 7, 14

Perma Life Mufflers, Inc. v. International Parts Corp., 392 U. S. 134 (1968), 88 S. Ct. 1981 .....10, 11, 16, 19, 21, 23, 25

Pfizer Inc. v. Government of India, 434 U. S. 308 (1978) 15

Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F. 2d 1179 (8th Cir. 1979) 7, 14, 16, 17, 22, 23

Simpson v. Union Oil Company, 377 U. S. 13 (1964) 20

TABLE OF CASES AND OTHER AUTHORITIES CONTINUED

PAGE

Sola Electric Co. v. Jefferson Electric Co., 317 U. S. 173 (1942) 10

Solomon v. Houston Corrugated Box Co., Inc., 526 F. 2d 389 (5th Cir. 1976) 29

Sullivan v. Little Hunting Park, Inc., 396 U. S. 229 (1969) 9

Textile Workers Union of America v. Lincoln Mills of Alabama, 353 U. S. 448 (1957) 8, 9

Twentieth Century-Fox Film Corp. v. Goldwyn, 328 F. 2d 190 (9th Cir. 1964), *cert. den.* 379 U. S. 880 (1964) 29

United States v. Associated Press, 52 F. Supp. 362 (S. D. N. Y. 1943), *affirmed*, 326 U. S. 1 (1945) 9, 10

United States v. Container Corp., 393 U. S. 333 (1969) 28

United States v. Republic Steel Corp., 362 U. S. 482 (1960) 9

United States v. Reliable Transfer Co., Inc., 421 U. S. 397 (1975) 24

TABLE OF CASES AND OTHER AUTHORITIES CONTINUED

PAGE

United States v. United States Gypsum Co., 438 U. S. 422 (1978) 28

Wyandotte Transporation Co. v. United States, 389 U. S. 191 (1967) 9

Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U. S. 321 (1971) 10

Statutes

15 U. S. C. 1, Sherman Act 1, 2, 3, 9, 10, 11, 12, 19, 28

15 U. S. C. 15, Clayton Act 1, 10, 11, 15, 19, 28

Rule 12(b)(6) Federal Rules of Civil Procedure 3

28 U. S. C. 1254(1) 2

Federal Water Pollution Control Act 8, 9

Other Authorities:

Jacobson, Contribution Among Antitrust Defendants: A Necessary Solution to a Recurring Problem, 32 U. Fla. L. Rev. (1980) (to be published) 7

Labor Management Relations Act of 1947 8

Note, Contribution and Antitrust Policy, 78 Mich. L. Rev. 892 (1980) 7

TABLE OF CASES AND OTHER AUTHORITIES CONTINUED

PAGE

Note, Contribution in Private Antitrust Actions, 93 Harv. L. Rev. 1540 (1980) 7

Schwartz, Simpson & Arnold, Contribution in Private Actions Under the Federal Antitrust Laws, 32 S.W.L.J. 779 (1979) 7

STATUTORY PROVISIONS

The pertinent statutes involved are Section 1 of the Sherman Act, 15 U. S. C. 1 and the Clayton Act, 15 U. S. C. 15.

15 U. S. C. 1:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 U. S. C. 15:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit in ***Wilson P. Abraham Construction Corp. v. Texas***

Industries, Inc. (hereafter *Abraham*) is reported at 604 F. 2d 897. The opinion of the United States District Court for the Eastern District of Louisiana, which was unpublished, appears in Joint Appendix page 46. Application for rehearing was denied on November 29, 1979.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on December 26, 1979. The Petition for Certiorari was filed January 24, 1980 and was granted November 3, 1980. This Court's jurisdiction is invoked under 28 U. S. C. 1254(1).

STATEMENT OF THE CASE

History of the Litigation and Course of Proceedings

Petitioner and respondents are manufacturers of ready-mix concrete in New Orleans, Louisiana.

On January 26, 1973, a grand jury sitting in the United States District Court, Eastern District of Louisiana, handed down criminal indictments charging petitioner, Texas Industries, Inc. and one of its employees, respondent Radcliff Materials, Inc. and one of its employees, respondent Jahncke Services, Inc. and one of its employees, and respondent Jimco, Inc. with violations of 15 U. S. C. 1. The indictments charged the existence of an unlawful combination and conspiracy in unreasonable restraint of interstate trade consisting of an agreement between the defendants to raise and stabilize the price of ready-mix concrete in the New Orleans area. The criminal proceedings were ultimately concluded with convictions based upon *nolo contendere* pleas by each of the defendants.

On September 8, 1975, Wilson P. Abraham Construction Corporation instituted this action against petitioner, Texas

Industries, Inc. and Frank T. Dooley, one of the petitioner's former employees. 3/ The complaint, Joint Appendix page 1, alleged antitrust violations by petitioner and its alleged co-conspirators.

More specifically, the Complaint alleges a violation of the Sherman Act, 15 U. S. C. 1, consisting of a continuing agreement among petitioner, Dooley and their co-conspirators to raise and stabilize the price of ready-mix concrete in the New Orleans area.

Interrogatories filed by petitioner, and answers thereto, revealed that the unnamed alleged co-conspirators included Jimco, Inc., Radcliff Materials, Inc. and Jahncke Services, Inc. Petitioner thereafter filed a third-party complaint naming Jimco, Inc., Radcliff Materials, Inc. and OKC Dredging, Inc. as third-party defendants. In the third-party complaint, Texas Industries sought contribution from the third-party defendants in the event it was found liable to Wilson P. Abraham Construction Corporation in the main demand.

Each of the third-party defendants filed motions pursuant to Federal Rule 12(b) (6) seeking dismissal of the third-party complaint contending that no right of contribution exists among alleged antitrust co-conspirators under the antitrust laws of the United States.

Disposition in District Court

The District Court entered a Minute Entry on October 4, 1977 (Joint Appendix page 46) granting the motions to dismiss filed by the third-party defendants and, on March 29, 1978, the

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3/ Frank T. Dooley has never been served with the Complaint and has never made an appearance.

Court entered an order expressly determining that there was no just reason for delay in the entry of judgment until final determination of all issues in this action, and directing the Clerk to enter the October 4, 1977 Minute Entry as a final judgment. In accord with the said March 29, 1978 order, final judgment was entered on March 29, 1978 dismissing Texas Industries' third-party complaint with prejudice.

Disposition in the Fifth Circuit

On April 5, 1978, Texas Industries timely filed its Notice of Appeal from the judgment of the District Court.

On October 16, 1979, the Fifth Circuit handed down its opinion affirming the District Court's dismissal of petitioner's third-party complaint and holding that no right to contribution exists under the Federal antitrust laws. A petition for rehearing was denied on November 29, 1979, and judgment of the Fifth Circuit was entered on December 26, 1979 (Joint Appendix page 50).

SUMMARY OF ARGUMENT

In order to further the purposes of the antitrust laws, this Court has the power to and should apply federal common-law principles and permit contribution in antitrust cases. This Court has previously recognized that fundamental fairness requires that one wrongdoer should not be compelled to pay all of the damages caused by concurrent actions. That equitable principle should be equally applicable in the context of the antitrust laws, where damages sustained by a plaintiff are trebled, and particularly, where liability is founded on Section 1 of the Sherman Act, which requires a concert of action before a violation thereof can be had.

Contribution has been almost universally accepted by the lower courts in all areas of federal law, including statutes that do not expressly provide for contribution. Fundamental fairness has been the principal reason behind recognition of this remedy.

Contribution will further the objectives of the antitrust laws. Recognition of this remedy will deter future violation of the antitrust laws by guaranteeing that those whose joint action brought about the plaintiff's injuries will be forced to share in the payment thereof. It will avoid circumstances where, through the plaintiff's whim or collusive actions, the entire burden would otherwise be placed on less than all of the violators. Contribution will also ensure that none will keep the fruits of their illegal activities. Without a rule permitting contribution, there will be no method by which those not sued by the plaintiff can be forced to share in the payment of damages caused by their joint participation in an illegal scheme, thus thwarting, in such cases, clear Congressional intent.

Contribution can be applied in such a fashion to encourage and finalize settlements. This remedy will not complicate the plaintiff's case and will not inject new issues or require the introduction of new evidence into already complex litigation.

Evidence presented by the plaintiff to establish liability and injury will be sufficient evidence on which to establish standards for applying contribution.

The remedy of contribution is consistent with the purposes of the antitrust laws, encourages competition while discouraging antitrust violations, and permits the courts to apply equitable principles of fairness between the parties.

ARGUMENT

The issue before the Court is whether defendants in antitrust cases may assert claims for contribution. Three Circuit Courts have addressed this issue. 4/ Many commentators have likewise focused on the question. 5/ All seem to approach it in the framework of whether there should be contribution, and varying views have been expressed. When a question of such fundamental fairness is considered, however, the more appropriate way to confront the problem should be to ask why should it *not* be a recognized remedy. When viewed in that light, with the compelling arguments hereafter stated, we suggest that only when a right to contribution is recognized among antitrust offenders can basic constitutional principles of fairness be achieved.

I. THE COURT HAS THE POWER TO RECOGNIZE CONTRIBUTION UNDER THE ANTITRUST LAWS

In recognizing a right to contribution under the antitrust laws, this Court would not thereby create a new cause of action. Congress intended that all who violated the antitrust laws pay the consequences of their illegal acts. Thus, contribution merely enables the courts to divide this liability among all of those

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4/ In addition to the Fifth Circuit's decision in this case, see *Professional Beauty Supply, Inc. v. National Beauty Supply, Inc.*, 594 F. 2d 1179 (8th Cir. 1979) and *Olson Farms, Inc. v. Safeway Stores, Inc.*, 1977-2 Trade Cases (CCH) ¶61, 698 (D. Utah 1977), affirmed, 1979-2 Trade Cases (CCH) ¶62,995 (10th Cir. 1979), *en banc rehearing granted and pending* Dec. 27, 1979).

5/ E. g., Jacobson, Contribution Among Antitrust Defendants: A Necessary Solution to a Recurring Problem, 32 U. Fla. L. Rev. (1980) (to be published); Schwartz, Simpson & Arnold, Contribution in Private Actions Under the Federal Antitrust Laws, 32 S. W. L. J. 779 (1979); Note, Contribution and Antitrust Policy, 78 Mich. L. Rev. 892 (1980); Note, Contribution in Private Antitrust Actions, 93 Harv. L. Rev. 1540 (1980).

intended by Congress to bear it.

The Court has often recognized the power of the federal judiciary to supplement express remedies. For example, in *Textile Workers Union of America v. Lincoln Mills of Alabama,* 353 U. S. 448 (1957) the question was whether the federal courts had the power, under the Labor Management Relations Act of 1947, to compel an employer to comply with certain contractual grievance arbitration provisions. With the purpose of effectuating the Act's policy in mind, the Court recognized the federal courts' power to compel arbitration and, in so doing, observed that:

> The Labor Management Relations Act expressly furnishes some substantive law. It points out what the parties may or may not do in certain situations. Other problems will lie in the penumbra of express statutory mandates. Some will lack express statutory sanction but will be solved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy. The range of judicial inventiveness will be determined by the nature of the problem.

Id. at 457.

In *Illinois v. City of Milwaukee, Wisconsin,* 406 U. S. 91 (1972), the State of Illinois filed a motion to file a complaint under the Court's original jurisdiction against four Wisconsin cities and certain city commissions seeking to abate pollution of Lake Michigan. Discussing the scope of remedies under the Federal Water Pollution Control Act, the Court said:

> The remedy sought by Illinois is not within the precise scope of remedies prescribed by Congress. Yet the remedies which Congress provides are not necessarily the only federal remedies available.

> 'It is not uncommon for federal courts to fashion federal law where federal rights are concerned.' ***Textile Workers v. Lincoln Mills,*** 353 U. S. 448, 457. When we deal with air and water in their ambient or interstate aspects, there is a federal common law, as ***Texas v. Pankey***, 441 F. 2d 236, recently held.
>
> The application of federal common law to abate a public nuisance in interstate or navigable waters is not inconsistent with the Water Pollution Control Act.

Id. at 103, 104 (footnote omitted). Similar Court action appears in ***Wyandotte Transportation Co. v. United States,*** 389 U. S. 191 at 200-201 (1967), ***Sullivan v. Little Hunting Park, Inc.,*** 396 U. S. 229, 239 (1969), and ***United States v. Republic Steel Corp.,*** 362 U. S. 482 (1960).

The antitrust laws are an area of special federal concern and clearly this Court has the power to recognize the right to contribution. Although the right to contribution is not specifically mentioned in the antitrust laws, liability under those laws is determined in conjunction with common-law principles:

> Congress, however, did not intend the text of the Sherman Act to delineate the full meaning of the statute or its application in concrete situations. The legislative history makes it perfectly clear that it expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition.

National Society of Professional Engineers v. United States, 435 U. S. 679, 688 (1978) (footnote omitted).

It has also been observed that "Congress has incorporated into the Anti-Trust Acts the changing standards of the common law, and by so doing has delegated to the courts the duty of fixing the standard for each case." ***United States v. Associated***

Press, 52 F. Supp. 362, 370 (S. D. N. Y. 1943), *affirmed*, 326 U. S. 1 (1945).

The courts have frequently resolved issues under the Sherman and Clayton Acts through exercise of federal common-law powers. They have applied principles of joint and several liability to the antitrust laws, recognizing violators to be joint tortfeasors. *City of Atlanta v. Chattanooga Foundry & Pipe-works*, 127 F. 23, 26 (6th Cir. 1906), *affirmed*, 203 U.S. 390 (1906); *Lawlor v. National Screen Service Corp.*, 349 U. S. 322, 330 (1955). Federal common law was applied to determine the effect of a release under the antitrust laws, *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U. S. 321, 343-48 (1971), and was discussed by the Court while considering *in pari delicto* as a defense in federal antitrust actions, *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U. S. 134, 137-40 (1968).

This Court has stated:

> When a federal statute condemns an act as unlawful, the extent and nature of the legal consequences of the condemnation, though left by the statute to judicial determination, are nevertheless federal questions, the answers to which are to be derived from the statute and the federal policy which it has adopted.

Sola Electric Co. v. Jefferson Electric Co., 317 U. S. 173, 176 (1942).

Since there is nothing in the legislative history of the Sherman Act or the Clayton Act to indicate that Congress considered whether contribution was available to defendants in antitrust actions, the issue should be decided by this Court.

Petitioner is not asking this Court to imply a new private cause of action within the meaning of *Cort v. Ash*, 422 U. S. 66 (1975), any more than did the petitioners in *Perma Life*

Mufflers, supra. There, as here, the question was whether the relief requested was necessary to implement the underlying policies of the antitrust laws.

The express policy of the Sherman Act is that "*Every person* who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty . . ." 15 U. S. C. 1 (emphasis added). The Clayton Act, 15 U. S. C. 15, provides civil liability for those acts deemed illegal. It is violation of 15 U. S. C. 1 with which petitioner is charged. Without contribution under facts such as those existing in this case, Congress' intent will be partially thwarted, since "every person", whose joint efforts created liability, cannot in some instances be found liable.

Moveover, as hereafter expressed, without a right of contribution the deterrence objective of the antitrust laws will be lessened, certain willful violators of the laws will keep the fruits of their illegal acts, and, in effect, the pool of private attorneys general will be reduced. 6/

In sum, contribution would not be a new cause of action. It would merely provide a remedy by which full Congressional intent can be achieved. Under the Clayton Act, it is the injured plaintiff who has the express cause of action. Contribution ensures that all of those whom Congress decreed would be liable will share in the payment of plaintiff's injuries.

II. FOR REASONS OF FUNDAMENTAL FAIRNESS, CONTRIBUTION SHOULD BE RECOGNIZED UNDER THE ANTITRUST LAWS

Prohibiting contribution can unjustly place full economic

6/ *Perma Life Mufflers v. International Parts Corp.*, 392 U. S. 134 (1968).

burden on less than all joint tort-feasors. The effect of such a rule is particularly unjust under the antitrust laws where damages are trebled and where liability under Section 1 of the Sherman Act cannot be assessed in the first place without the act of two or more tort-feasors.

This inequitable and potentially devastating financial burden could be imposed upon less than all participants in an unlawful scheme solely by the random and arbitrary decision of a plaintiff. For example, under the facts of this case, petitioner and respondents were indicted and charged with entering into an unlawful combination in restraint of trade, consisting of an agreement ***between the defendants*** to raise and stabilize the price of ready-mix concrete in New Orleans. All four were convicted on ***nolo contendere*** pleas. Yet, Wilson P. Abraham Construction Corp. sued only Texas Industries, Inc. and thus seeks to impose entire liability on Texas Industries, Inc. - liability that could not be imposed at all without the participation of one or more of the respondents in a scheme found unlawful.

The economic severity of the burden imposed by such a rule could depend solely upon the number of defendants sued or the number against whom the plaintiff chooses to execute. Neither the relevant statutes, nor the legislative history of the Act, nor prior interpretive decisions of the courts suggest that Congress had such an intent. To the contrary, in imposing the requirement that there be an illegal ***combination*** for one to be liable under 15 U. S. C. 1, it seems a logical interpretation that those who combined illegally were to be exposed to the same liability. Principles of fundamental fairness dictate the same conclusion.

Concepts of justice and fairness have been the principal reasons behind the evolution of federal common law on the contribution issue. Today, contribution is available in virtually

every area of federal law. For example, the obvious inequity of the no-contribution law was rejected by this Court in *Cooper Stevedoring Co., In., v. Fritz Kopke, Inc.*, 417 U. S. 106 (1974). The Court, permitting contribution between tort-feasors in maritime non-collision cases to ensure fairness, stated it this way:

> [A] *"more equal distribution of justice"* can best be achieved by ameliorating the common-law rule against contribution which permits a plaintiff to force one of two wrongdoers to bear the entire loss, though the other may have been equally or more to blame.

417 U. S. 111 (emphasis added)

Just last year, in *Edmonds v. Compagnie Generale Transatlantique*, 443 U. S. 256, 271-72, n. 30 (1979), a maritime negligence action, this Court noted the general rule that tort-feasors may normally seek contribution from one another, and observed that "Contribution remedies the unjust enrichment of the concurrent tort-feasor. . . ."

Most other courts have recognized the need for contribution. The Seventh Circuit followed *Cooper Stevedoring* in *Heizer Corp. v. Ross*, 601 F. 2d 330 (7th Cir. 1979), permitting contribution among defendants under the securities laws in order to have "a more equal distribution of justice." *Id.* at 332.

That Court said:

> The policy underlying the securities laws is reinforced by applying contribution. By apportioning the loss among joint wrongdoers the deterrent effect of the judgment is felt by all culpable parties and the protected investor class has available to it a broader source of reimbursement.

Id. at 332.

Contribution has been recognized in civil rights cases, where no statutory right exists. In ***Glus v. G. C. Murphy Co.***, 629 F. 2d 248, at 252 (3rd Cir. 1980), the Third Circuit said that:

> The rule prohibiting contribution has come into disrepute. It is now widely recognized that ***fundamental fairness*** demands a sharing of the liability. Without a right of contribution a wrongdoer may escape liability for his actions because of the happenstance of the plaintiff's choice of defendants. (emphasis added)

Explaining its reasoning, the Court stated that "the contribution rule prevents a plaintiff from becoming unjustly enriched either by collusive activity with one of the defendants, or by threatening one defendant that the suit will be brought only against it, thereby coercing a settlement." *Id.* at 256.

It was also permitted in a mid-air collision case, which the Seventh Circuit said is controlled by federal common law. ***Kohr v. Allegheny Airlines, Inc.***, 504 F. 2d 400 (7th Cir. 1974), ***cert. den.*** 421 U. S. 978 (1975). The Court rejected "as being outmoded and entirely unsatisfactory, the contention that the federal rule should be one of no contribution." *Id.* at 405.

In the only appellate court decision allowing contribution under the antitrust laws, ***Professional Beauty Supply, Inc. v. National Beauty Supply, Inc.***, 594 F. 2d 1179 (8th Cir. 1979), 7/ the Eighth Circuit based its holding squarely on considerations of fairness:

7/ Neither the Fifth Circuit in this case nor the Tenth Circuit in *Olson Farms Inc. v. Safeway Stores, Inc.*, 1979-2 Trade Cases (CCH) at 62,995 (10th Cir. 1979) *en banc* rehearing granted and pending (Dec. 27, 1979), addressed the issue of fairness between the parties.

> The deciding factor in our decision is ***fairness between the parties.*** We conclude that fairness requires that the right of contribution exist among joint tortfeasors at least under certain circumstances. There is an obvious lack of sense and justice in a rule which permits the entire burden of restitution of a loss for which two parties are responsible to be placed upon one alone because of the plaintiff's whim or spite, or his collusion with the other wrongdoer.

Id. at 1185, 86 (emphasis added).

A rule denying contribution among tort-feasors is patently inequitable. Such a rule is archaic and has no place under the economics of these times. Contribution eliminates concern that either discrimination by a plaintiff, or collusion between the plaintiff and some of the wrongdoers, will operate to shift unjust portions of liability to less than all of the participants, without whose joint efforts there could have been no liability in the first place.

III. CONTRIBUTION FURTHERS THE BASIC OBJECTIVES OF THE ANTITRUST LAWS

This Court has expressed three basic objectives of section 4 of the Clayton Act, 15 U. S. C. 15. First, it is designed to compensate victims of antitrust violations. Second, it promotes a deterrence of future violations. Third, it deprives violators of the fruits of their illegal acts. ***Illinois Brick Co. v. Illinois,*** 431 U. S. 720, 726 (1977); ***Pfizer Inc. v. Government of India,*** 434 U. S. 308, 314 (1978). Of course, contribution does not affect the first objective since the plaintiff's right to collect from any one or more of the defendants is left unimpaired. However, contribution will increase the deterrent effect of the Clayton Act and, more importantly, only with contribution available among joint wrongdoers will each wrongdoer be de-

prived of the fruits of his illegal acts.

A. Contribution Promotes Deterrence

In *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U. S. 134 1968), this Court said that "the purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat *to deter* anyone contemplating business behavior in violation of the antitrust laws." *Id.* at 139 (emphasis added). If there is no right to contribution, those whom the plaintiff chooses not to sue escape all liability, a result totally inconsistent with the Court's pronouncement in *Perma Life*.

The Fifth Circuit's rationale for distinguishing between a no-contribution rule and *Perma Life's* rejection of *in pari delicto* is equally unpersuasive. It said:

> There is an obvious and fundamental difference between a rule that bars suit by a plaintiff who in any way participated in the antitrust violation and a rule that forbids a defendant from obtaining contribution from his fellow wrongdoers. A rule barring any culpable plaintiff diminishes the deterrent effect of the antitrust laws by reducing the pool of potential private attorneys general who can instigate costly and uncertain antitrust litigation.

604 F. 2d at 902, 903. Although a rule barring any culpable person from filing suit could diminish the deterrent effect of the antitrust laws by reducing the pool of potential private attorneys general who can instigate costly antitrust litigation, so, too, the effect of a rule barring contribution could reduce the scope of available actions against wrongdoers while at the same time unjustly enriching those not sued by the plaintiff.

The Eighth Circuit, in *Professional Beauty Supply*, felt that

a no-contribution rule would dilute the deterrence objective of the antitrust laws:

> To deny contribution would be to dilute the deterrent effect of the antitrust laws, since a participant in an antitrust violation could escape all responsibility for its wrongdoing.

594 F. 2d at 1185. The *Professional* Court also observed the possibility that a no-contribution rule might act as a counter-deterrence:

> The fact that one tortfeasor may be held liable for all damages arising from the antitrust violations necessarily means that other joint tortfeasors may go "scot free." This possibility of escaping all liability might cause many to be more willing, rather than less willing, to engage in wrongful activity.

Id. at 1185.

The Fifth Circuit rejected the idea that contribution promotes deterrence, believing instead that greater deterrence is found in the exposure of paying a large judgment without contribution. 604 F. 2d 901. Aside from questions of fair play, however, the deterrence objective is clearly met more efficiently under a rule that insures the certainty that all responsible parties must account for their illegal acts.

Moreover, the denial of contribution could actually bring about a result totally anomalous to the intent of the antitrust laws. Permitting a plaintiff to shift total loss on to less than all participants in an illegal scheme could deter and hinder competition. The magnitude of the burden could result in financial ruin, thereby eliminating some competitors from the market.

B. Contribution Ensures That No One Keeps The Fruits of His Illegal Acts

Without contribution there is no certainty that those who violate the antitrust laws are deprived of the fruits of their illegal conduct. This Court emphasized the importance of this objective in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U. S. 481 (1968):

> In addition, if buyers are subjected to the passing-on defense, those who buy from them would also have to meet the challenge that they passed on the higher price to *their* customers. These ultimate consumers, in today's case the buyers of single pairs of shoes, would have only a tiny stake in a lawsuit and little interest in attempting a class action. In consequence, those who violate the antitrust laws by price fixing or monopolizing would retain the fruits of their illegality because no one was available who would bring suit against them. ***Treble-damage actions, the importance of which the Court has many times emphasized, would be substantially reduced in effectiveness.***

Id. at 494 (emphasis added).

Only where a cause of action for contribution exists does there also exist the certainty that none are unjustly enriched at the expense of the others and the certainty that none will keep their illgotten gains.

C. Contribution Ensures Good Faith Settlements

Without contribution there is no deterrence to the bad faith or sweetheart settlements made for the purpose of, for example, financing the case or obtaining the settling defendants' collusive aid against remaining defendants. Plaintiffs can settle without regard to the relative merits, knowing that as each

defendant settles the rest face ever increasing liability. Companies could thereby be economically compelled to settle and forego their day in court even if they professed innocence.

Encouragement of fair settlements is, of course, an objective in all disputes, not just those under the antitrust laws. With contribution, all parties will know where they stand when considering settlement and, at the same time, all parties will have the appropriate incentives to enter into good faith settlements based upon the merits of the case.

IV. CONTRIBUTION ENSURES AVAILABILITY OF REMEDIES TO PROMOTE PUBLIC POLICY OF THE ANTITRUST LAWS

In *Perma Life Mufflers, Inc. v. International Parts Corp., supra,* the Court was faced with whether plaintiffs in a private antitrust action could be barred from recovery by the *in pari delicto* doctrine. The complaint charged that Midas, Inc. conspired with its parent corporation, International Parts Corp., two other subsidiaries and six individuals in violation of the Sherman and Clayton Acts.

International Parts was a muffler manufacturer. In connection with its nationwide plan to sell mufflers, prospective dealers were offered sales agreements by its subsidiary Midas. The dealers agreed to, among other things, purchase all mufflers from Midas, sell the mufflers at resale prices fixed by Midas and at specified locations, and to refrain from dealing with any of Midas' competition. The petitioners, dealers who had signed the agreement, challenged those provisions as illegal restraints of trade.

Agreeing with the District Court, the Court of Appeals held that the *in pari delicto* doctrine barred the suit, noting that

each of the petitioners had enthusiastically sought the Midas franchise with full knowledge of the provisions, had made enormous profits, had eagerly sought additional franchises and had voluntarily entered into additional franchise agreements while fully aware of the challenged restrictions.

Reversing the Court of Appeals, this Court said:

> We find ourselves in complete disagreement with the Court of Appeals. There is nothing in the language of the antitrust acts which indicates that Congress wanted to make the common-law ***in pari delicto*** doctrine a defense to treble-damage actions, and the facts of this case suggest no basis for applying such a doctrine even if it did exist. Although ***in pari delicto*** literally means "of equal fault," the doctrine has been applied, correctly or incorrectly, in a wide variety of situations in which a plaintiff seeking damages or equitable relief is himself involved in some of the same sort of wrongdoing. We have oftern indicated the inappropriateness of invoking broad ***common-law barriers to relief where a private suit serves important public purposes.***

Id. at 138 (emphasis added).

The Court explained that it was for this reason that it had held, in *Kiefer-Stewart Co. v. Seagram & Sons*, 340 U. S. 211 (1951), that an antitrust plaintiff could not be barred from recovery by virtue of his engagement in an unrelated antitrust conspiracy and that, in *Simpson v. Union Oil Co.*, 377 U. S. 13 (1964), a dealer whose consignment agreement was cancelled for failure to adhere to a fixed resale price could nonetheless sue, even though by signing the agreement he had become a participant in the illegal scheme. The Court went on to say that:

> Both *Simpson* and *Keifer-Stewart* were premised on a

> recognition that *the purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat* to deter anyone contemplating business behavior in violation of the antitrust laws. The plaintiff who reaps the reward of treble damages may be no less morally reprehensible than the defendant, but the law encourages his suit to further the overriding public policy in favor of competition. A more fastidious regard for the relative moral worth of the parties would only result in seriously undermining the usefulness of the private action as a bulwark of antitrust enforcement.

392 U. S. at 139 (emphasis added).

In thus rejecting *in pari delicto* as a defense to antitrust claim, the Court made it clear that mere participation in an illegal scheme would not bar the participant from recovering three times the damages he sustained in the course of that participation.

The ruling enunciated in *Perma Life* would not, of course, insulate the petitioners there from liability to any third parties who might have sustained injury as a result of the asserted antitrust violations. Indeed they, together with Midas and the other respondents, could have been subjected to paying three times the damages sustained by any such third party, presupposing a finding of liability. However, in light of the Court's ruling in *Perma Life Mufflers*, would the petitioners there have been denied the right to seek contribution from the Midas respondents had they alone been sued by injured third parties?

If, as this Court stated in *Perma Life Mufflers*, the law encourages a suit by one "no less morally reprehensible than the defendant" in order to "further the overriding public policy in favor of competition", it is difficult to perceive any rationale that would support a rule denying petitioner the right to seek

contribution in a situation where it finds itself the only party sued.

V. APPORTIONMENT OF LIABILITY UNDER A RULE RECOGNIZING CONTRIBUTION

If the Court recognizes a right to contribution under the antitrust laws, it should then consider the manner by which liability will be apportioned among the wrongdoers. Two methods are commonly used in jurisdictions where contribution is an accepted remedy. The same two have been the subject of considerable discussion among antitrust commentators. The first method, consistent with their status as joint tort-feasors, allocates liability equally among the tort-feasors. This method is referred to as *pro rata* or *per capita* 8/ The second method apportions liability on the basis of comparative fault or culpability in the illegal scheme. 9/

An approach to apportionment or division of liability under a rule permitting contribution should consider such factors as the wrongdoer's solidary liability, effect on settlement, effect on deterrence and manageability in litigation.

The precise method of apportionment could, of course, be left to the courts to be determined on a case by case basis,

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8/ The Court in *Professional Beauty Supply* used the term *pro rata*, 594 F. 2d 1182, fn. 4, although it seems clear it meant *per capita*. The two terms appear to be used synonomously in the context of apportionment under contribution.

9/ In this case, if it should be proven that the plaintiff Wilson P. Abraham Construction Co. is entitled to recover damages, either method of apportionment for contribution purposes would appear to produce the same result as all of the alleged co-conspirators were indicted by the grand jury and convicted on pleas of *nolo contendere*.

consistent with all of the relevant factors. There is no compelling reason why, in applying a basically equitable doctrine such as contribution, the courts cannot fashion such appropriate rules of apportionment as are necessary to achieve fairness between the parties while at the same time preserving the manageability of complex litigation.

A. Antitrust Violators Are Solidarily Liable

The relevant starting point in determining a formula for contribution should be the statute itself, and interpretive decisions that make it clear each violator is jointly liable with the others. 10/ As Justice White put it in *Perma Life*, damages ". . . may be had from either or both defendants without regard to their relative responsibility for originating the combination or their different roles in effectuating its ends. This is because neither defendant, if he acted alone, could be charged with violation; . . ." 392 U. S. 144. Thus, it is plain that as between themselves, each member of an illegal scheme is equally liable to the plaintiff. The act of one is deemed the act of all.

B. Apportionment to Promote Deterrence

The *Pro rata* rule was adopted by the Eighth Circuit in *Professional Beauty Supply*, where the Court based its decision on contribution providing greater deterrence:

> Because of the administrative difficulties of assessing exact percentages of fault in complicated antitrust actions and because we believe a rule of pro rata contribution ***will serve as a more effective deterrent*** to antitrust violations (i.e., under a comparative fault rule

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10/ *Lawlor v. National Screen Service Corp., supra.*

> some parties may feel they have little to lose in joining in an antitrust violation in a minor capacity), we adopt a rule of pro rata contribution except in unusual circumstances.

594 F. 2d at 1182 (emphasis added).

Pro rata apportionment would appear to offer greater deterrence at the inception of the potential violation. Where equally culpable participants are contemplating an unlawful scheme, it makes little difference, from a deterrence standpoint, whether contribution is apportioned on a *pro rata* or comparative culpability basis. The equally culpable participants would be liable for the same amount under either formula.

Under *pro rata* apportionment, one who views himself less culpable, or as a more passive violator, but who faces the prospect of potential exposure equal to that of the arguably more culpable offender, would be strongly deterred from entering the scheme altogether. Under comparative fault apportionment, on the other hand, a participant who views himself as less culpable, or who has some relatively small market power and merely follows the lead of those he views as more culpable and who have large market power, may well be encouraged to go along with the suggested scheme on the theory that he can make money if it works and minimize liability if caught. Deterrence of parties who are arguably less culpable may thus go a long way towards preventing the illegal combination. 11/

11/ This Court recently held that, in admiralty collision cases, *pro rata* division of damages should be replaced by a comparative negligence standard. *United States v. Reliable Transfer Co., Inc.*, 421 U. S. 397 (1975).

C. Effect on Manageability of Litigation

Pro rata apportionment would reduce issues for the courts to resolve and thus avoid increasing the complexity of already complex antitrust litigation. Under such a formula, all parties would know their ultimate exposure at the outset. Aside from the evidence required of the plaintiff to prove liability and injury in the first place, it would be unnecessary for the courts to receive evidence on the participant's respective liabilities as between themselves.

On the other hand, under a comparative fault concept, courts may have to consider many factors in every case in which contribution is sought. The factors might include those suggested by Justice White in his concurring opinion in ***Perma Life***. While discussing circumstances under which he might recognize ***in pari delicto*** as a defense, Justice White said:

> No simple formula can encompass the infinite variety of possible situations. Generally speaking, however, I would deny recovery where plaintiff and defendant bear substantially equal responsibility for injury resulting to one of them but permit recovery in favor of the one less responsible where one is more responsible than the other. This rule would simply pose the issue of causation in particularized form. There will be little mystery as to what evidence would be relevant proof: facts as to the relative responsibility for originating, negotiating, and implementing the scheme; evidence as to who might reasonably have been expected to benefit from the provision or conduct making the scheme illegal under § 1; proof of whether one party attempted to terminate the arrangement and encountered resistance or counter-measures from the other; facts showing who ultimately profited or suffered from the arrangement.

392 U. S. at 146-147.

Such factors would be difficult to measure with any real certainty. Their consideration may be appropriate for determining whether to permit suit by one participant to an unlawful scheme against another and allow him to recover treble damages caused in part by his own actions. It does not necessarily follow that the courts would want to consider them and apportion liability for damages between the participants themselves, each of whom is liable individually for all damages caused by the illegal activities. Evidence of these factors are of no concern to the plaintiff, and would not necessarily be presented in the plaintiff's case. Even if that type evidence, and the determination of comparative fault, were separated from the plaintiff's claim so as not to interfere with his action, it is questionable whether the courts should undertake to referee the percentage of fault to be attributed to each joint antitrust tort-feasor.

Logically, if contribution is apportioned under a comparative basis, the next step would be for defendants in all antitrust cases to call upon the courts to referee, and apportion as between themselves, the relative responsibility for payment of a judgment. Thus, even where a plaintiff sues all participants in an illegal scheme, the courts will be called upon to sort out the various facts necessary to a determination of comparative fault, and to allocate the percentage each defendant must pay. The defenses that could be expected to be asserted to determine relative liability among participants will be limited only by the imagination of defense counsel.

D. Effect on Settlement

An important question to be considered within the framework of how to apportion damages under a rule permitting contribution is the effect on settlement. A contribution rule should be formulated that will not adversely affect settlements.

Plaintiffs must know the value of what they are releasing and settling defendants must be relieved of any further liability.

Application of a rule that reduces the claim of a plaintiff who settles with one of multiple defendants by the settling defendant's *pro rata* share, and releases the settling defendant from any further liability, achieves the desired effect on settlement. The plaintiff will know, without the need to conduct extensive discovery, the maximum cost of settlement. If the facts show eventually that there are more wrongdoers than was thought at the time of settlement, the plaintiff is benefited since percentage reduction of ultimate recovery is thus reduced.

As the plaintiff is obligated to prove the existence of the illegal conspiracy, impact and damages in the first place, which would identify its participants, no new evidence need be presented to the courts. Apportionment under this rule should not conflict with jurisprudence that allows the plaintiff to recover the entire judgment from any one or more of the tort-feasors. It is merely a method of apportioning contribution among non-settling defendants.

Conversely, division of contribution upon a concept such as comparative fault could be more difficult for a plaintiff, or defendant, to quantify, and thus more likely to present obstacles to settlement. In order to know just what was being released, plaintiffs would have to measure the relative culpabilities of the defendants, which would require substantial evidence, and might not be ascertainable until after the trial itself.

VI. CONTRIBUTION SHOULD BE AVAILABLE AMONG BOTH INTENTIONAL AND UNINTENTIONAL VIOLATORS OF THE ANTITRUST LAWS

There is no reason to make a distinction between so-called intentional and unintentional violators of the antitrust laws when considering contribution. At the outset, it is difficult to come to grips with a workable definition of intentional or unintentional within the antitrust context. Courts might have to apply concepts akin to the sort of intent required for criminal convictions. See *U. S. v. Gysum Co.*, 438 U. S. 422 (1978).

A rule of contribution based upon intent would inevitably increase the complexity, and thus the cost, of antitrust litigation. As distinguished from the criminal intent the Court found to be a prerequisite to conviction in *U. S. v. Gypsum Co., supra,* civil liability under the price fixing provisions of the Sherman Act is based upon actions that have either the purpose or the effect of stabilizing prices. *McLain v. Real Estate Board of New Orleans Inc.*, 100 S. Ct. 502 (1980). *U. S. v. Container Corp.*, 393 U. S. 333 (1969). Thus, some definitions of intent would have to be formulated, and evidence thereof presented, all of which would necessitate a more complex trial. It could be difficult for the courts to decide, or agree upon, what type behavior is sufficiently intentional or unintentional to fix appropriate responsibility.

Aside from the difficulty of formulating rules on the question of intent, there is no basis for applying such a distinction, for neither the Sherman nor Clayton Acts make such a distinction. The Clayton Act speaks in terms of the amount of recovery a plaintiff may achieve, not in terms of the amount a defendant must pay, or what type of wrongdoer can be liable.

As aforesaid, it has been recognized by the Court that antitrust violators are joint tort-feasors in the conspiracy to which

they are a party. *Lawlor v. National Screen Service Corp., supra.* It has also been held that a plaintiff is not required to sue all co-conspirators but may, instead, choose to proceed against any one or more of them. *Northwestern Oil Co. v. Socony-Vacuum Oil Co.*, 138 F. 2d 967 (7th Cir. 1944), *cert. den.* 321 U. S. 792 (1944). In *Twentieth Century-Fox Film Corp. v. Goldwyn*, 328 F. 2d 190 (9th Cir. 1964), *cert. den.* 379 U. S. 880 (1964), recovery was permitted from a participant in an illegal conspiracy for damages caused by activities in which the defendant neither participated nor benefited.

The Fifth Circuit has observed that an antitrust action is in the nature of a tort action, that the defendants are jointly and severally liable, and that the fact that actual damages caused by certain defendants is proportionately small does not diminish their liability. *Solomon v. Houston Corrugated Box Co., Inc.*, 526 F. 2d 389, 392 (n. 4) (5th Cir. 1976).

Where no distinction has been made as to the primary liability of a defendant to a plaintiff based upon whether a defendant has acted intentionally or unintentionally, no such distinction should be made when considering contribution.

CONCLUSION

Petitioner, Texas Industries, Inc., respectfully requests the Court to reverse the judgment of the Court of Appeals for the Fifth Circuit and to remand the case to the district court for further proceedings with instructions to recognize petitioner's right to contribution under the antitrust laws.

December 17, 1980.

Respectfully submitted,

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JAN 17 1981

ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

TEXAS INDUSTRIES, INC.,
Petitioner,

versus

RADCLIFF MATERIALS, INC., JIMCO, INC. and OKC DREDGING, INC.,
Respondents.

On Writ of Certiorari to
The United States Court of Appeals
For the Fifth Circuit

BRIEF FOR RESPONDENTS RADCLIFF MATERIALS, INC., JIMCO, INC. and OKC DREDGING, INC.

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LISTING OF AFFILIATED CORPORATIONS

In accordance with Rule 28.1 of the Rules of this Court, the following is a listing of the parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of the respondents herein:

Radcliff Materials, Inc.

Dravo Corporation
Southern Industries Corporation
May Machinery Company
Round Rock Lime Company
SI Lime Company
SI Minerals, Inc.
Southern Stone Company, Inc.
Tideland Industries, Inc.

OKC Dredging, Inc.

OKC Corporation
Business Jet Service, Inc.
Compania Humboldt, C.A.
Inlet Petroleum UK Corporation
Inlet Petroleum (Caledonian) Limited
OKC Development Corporation
OKC Exploration Inc.
OKC Petroleum International, Inc.
OKC Realty, Inc.

Jimco, Inc.

None

TABLE OF CONTENTS

Page

Listing of Affiliated Corporations i

Table of Authorities iii

Statement of the Case 2

Summary of the Argument 4

Argument 7

I. The Rule Against Contribution Under the Antitrust Laws is Based Upon Sound Public Policy 11

II. Creation of a Right of Contribution Among Coconspirators Would Exacerbate Intolerably the Complexities of Antitrust Litigation 24

III. Judicial Action to Create a Right of Contribution Among Coconspirators is Inappropriate 40

Conclusion 45

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Cases:

Alabama v. Blue Bird Body Co., No. 75-23-N (M.D. Ala. 1979) 16

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Page

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Columbia Pictures Industries, Inc. v. Schneider, 435 F.Supp. 742 (S.D.N.Y. 1977), *aff'd*, 473 F.2d 1288 (2d Cir. 1978) 18

In re Corrugated Container Antitrust Litigation, 84 F.R.D. 40 (S.D. Tex. 1979), *aff'd* 606 F.2d 319 (5th Cir. 1979) 25

Cotton v. Hinton, 559 F.2d 1326 (5th Cir. 1977) 18

Edmonds v. Compagnie Generale Transatlantique, 433 U.S. 256 (1979) 41

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Getter v. R. G. Dickinson & Co., 336 F.Supp. 559 (S.D. Iowa 1973) 27

Gobble v. Bradford, 226 Ala. 517, 147 So. 619 (1933) 11

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Page

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Reiter v. Sonotone Corp., 442 U.S. 330 (1979) 46

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Page

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United States Dental Inst. v. American Association of Orthodonists, 396 F.Supp. 565 (N.D. Ill. 1975) . 32-33

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Page

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15 U.S.C. 16, 26, Clayton Act 13

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Page

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No. 79-1144

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

TEXAS INDUSTRIES, INC.,
Petitioner,

versus

RADCLIFF MATERIALS, INC., JIMCO, INC.
and OKC DREDGING, INC.,
Respondents.

On Writ of Certiorari to
The United States Court of Appeals
For the Fifth Circuit

BRIEF FOR RESPONDENTS RADCLIFF MATERIALS, INC., JIMCO INC. and OKC DREDGING, INC.

STATEMENT OF THE CASE

Petitioner and respondents are manufacturers of ready-mix concrete in New Orleans, Louisiana.

In January of 1973, petitioner and respondents became involved in criminal proceedings arising out of indictments handed down by a Grand Jury sitting in the United States District Court for the Eastern District of Louisiana. The indictments alleged that petitioner Texas Industries, Inc. and one of its employees, respondent Radcliff Materials, Inc. and one of its employees, Jahncke Services, Inc. (a corporation whose assets and liabilities were subsequently acquired by respondent OKC Dredging, Inc.) and one of its employees, and respondent Jimco, Inc. engaged in an unlawful combination and conspiracy to raise and stabilize the price of ready-mix concrete in the New Orleans area, in violation of Section 1 of the Sherman Act, from about the middle of 1968 until sometime in 1970. These criminal proceedings were ultimately concluded in 1973 with convictions based upon *nolo contendere* pleas by each of the defendants.

Wilson P. Abraham Construction Corporation ("Abraham") is a Louisiana company engaged in the business of building residential and commercial structures. Abraham purchased ready-mix concrete from petitioner Texas Industries, Inc., but not from any of the respondents (J.A. 24-5).

On September 8, 1975, Abraham filed suit against petitioner Texas Industries, Inc. and Frank T. Dooley,

one of the petitioner's former employees, to recover damages for alleged overcharges paid by it to petitioner on purchases of ready-mix concrete from petitioner. Abraham's complaint avers that such overcharges were the result of a combination and conspiracy among petitioner, Dooley and their coconspirators to raise and stabilize the price of ready-mix concrete in the New Orleans area, in violation of Section 1 of the Sherman Act (J.A. 6).

Interrogatories filed by petitioner, and answers thereto, revealed that petitioner's alleged coconspirators, who were not named in Abraham's complaint, included Radcliff Materials, Inc., Jahncke Services, Inc. and Jimco, Inc. They also revealed that Abraham never purchased any ready-mix concrete from these alleged coconspirators (J.A. 21, 24-5).

On March 2, 1977, petitioner Texas Industries filed a third-party complaint against respondents Radcliff, Jimco and OKC, seeking contribution from respondents in the event it was found liable to Abraham in the main demand.

Each of the third-party defendants filed motions pursuant to Rule 12(b)(6) seeking dismissal of the third-party complaint on the ground that no right of contribution exists among alleged antitrust coconspirators under the antitrust laws of the United States.

On October 4, 1977, the United States District Court for the Eastern District of Louisiana entered a Minute Entry (J.A. 46) granting the motions to dismiss filed by the third-party defendants.

On March 29, 1978, the district court entered an order expressly determining that there was no just reason for delay in the entry of judgment until the final determination of all issues in this action, and directing the clerk to enter the October 4, 1977 Minute Entry as a final judgment. Pursuant to this order, final judgment was entered on March 29, 1978, dismissing Texas Industries' third-party complaint with prejudice.

On April 5, 1978, Texas Industries timely filed its Notice of Appeal from the judgment of the district court. On October 16, 1979, the Fifth Circuit Court of Appeals handed down its opinion affirming the district court's dismissal of petitioner's third-party complaint, and holding that no right to contribution exists under the federal antitrust laws. A petition for rehearing was denied on November 29, 1979, and judgment of the Fifth Circuit was entered on December 26, 1979 (J.A. 50).

SUMMARY OF ARGUMENT

Petitioner Texas Industries is here to seek a fundamental change in the federal antitrust laws: it asks this Court to create a whole new class of claims for contribution among antitrust coconspirators. Arrayed against petitioner's position are the dictates of sound public policy, the realities of managing complex antitrust litigation and the overwhelming weight of judicial authority.

Texas Industries attempts to circumvent these considerable obstacles by contending that "fundamental fairness" mandates creation of a contribution cause of

action. Professors Areeda and Turner have noted that "[a]s a goal of antitrust policy, 'fairness' is a vagrant claim applied to any value that one happens to favor." 1 Areeda and Turner, ANTITRUST LAW §109 at 21 (1978). It would be difficult indeed to find a more apt illustration of the astuteness of this observation than the case at bar. Creation of a contribution remedy would not only allow Texas Industries to escape all liability in this case even if it were found liable to the plaintiff in the main demand, but it would also actually permit Texas Industries to retain a very substantial portion of any illegal profits it received from the plaintiff.

Of course, situations can arise where, unlike here, application of the rule against contribution seems harsh. But that simply demonstrates the necessity for evaluating the rule against contribution in the context of the broad public policy considerations and practical considerations that gave rise to it, instead of the context of individual factual circumstances.

The rule against contribution has its roots in society's unwillingness to put the machinery of the courts in motion to adjust equities between persons who have been engaged in unlawful conduct. In view of the present burdens on the federal court system, the policy of preserving judicial resources for redress of injuries sustained by those who abide by the law is even more necessary today than it was when the policy was first established. And this policy is particularly appropriate in the context of judicial administration over enforcement of the antitrust laws.

Allowing coconspirators to assert contribution claims would rob the antitrust plaintiff of control over his case, by allowing defendants to bring additional parties whom the plaintiff never chose to sue into the litigation, in an effort to reduce the potential damages the defendants would be liable for in the event of an adverse judgment.

Contribution would frustrate the strong judicial policy favoring settlement. No defendant would ever settle an antitrust case if he knew he could find himself back in the suit as a third-party defendant.

Contribution would also undermine the deterrent effect of the antitrust laws by permitting violators to spread the "losses" occasioned by private antitrust treble damage awards, thereby reducing the risks involved in engaging in anticompetitive practices.

In addition to these policy considerations, a whole host of practical considerations militate against creation of a contribution cause of action. Contribution would mean there would be many more parties in every antitrust case. New contribution pleadings, claims and discovery requests would exacerbate manageability problems at the pretrial stage, and it would be even worse at trial. Employment of joint defense efforts in processing complex antitrust litigation would become a thing of the past. The difficult task of apportioning liability among coconspirators would pose dilemmas that beleaguered trial courts could readily do without. In sum, contribution in antitrust cases would

impose overwhelming complexities and costs upon the federal court system.

Finally, it would be inappropriate to create a right of contribution among antitrust coconspirators by judicial action in any event. Due to the major impact creation of such a cause of action would have on the enforcement and administration of the antitrust laws, a broad and empirical study of the complex social and economic effects of contribution should be undertaken before any change in the present rule is contemplated. As this Court's precedents make clear, Congress is the appropriate forum for a study of this kind. Petitioner's demands should be referred to Congress.

ARGUMENT

At the heart of petitioner's argument for creation of a contribution cause of action in antitrust cases is the contention that "fundamental fairness" mandates such a result. Petitioner's Brief 11-15. Indeed, petitioner views this proposition as so self-evident that it dismisses inquiry into the question of whether there *should* be contribution as superfluous:

> When a question of such fundamental fairness is considered, however, the more appropriate way to confront the problem should be to ask why should it *not* be a recognized remedy.
>
> Petitioner's Brief 7.

Can it be, as petitioner implies, that the rule against contribution survives merely as an historical anach-

ronism, without support in either logic or native sense? Can it be that eighteen of the nineteen federal appellate and district courts that have independently considered the rule against contribution in antitrust cases have closed their eyes to fundamental fairness and affirmed the rule just out of an overzealous devotion to the principle of *stare decisis*? Plainly not.

"Fundamental Fairness"

Fundamental fairness does *not* compel the result petitioner seeks, and nothing better illustrates this point than the facts of the very case now before the Court. Petitioner Texas Industries was one of four companies indicted in New Orleans for allegedly conspiring to fix prices on ready-mix concrete. Of the four, Texas Industries was the *only one* that sold any concrete to Abraham, the original plaintiff in this action. Thus, if there was a conspiracy and Abraham was overcharged for concrete, *all* such overcharges went into the coffers of Texas Industries. None of the other three companies received a nickel's worth of profits from overcharges to Abraham. Abraham accordingly instituted suit against Texas Industries alone, asserting that Texas Industries had overcharged it in the amount of $200,000, and seeking treble that amount, or $600,000, in total damages, pursuant to Section 4 of the Clayton Act, 15 U.S.C. §15.[1] Complaint, ¶¶ 7.2 & 12.1, J.A. 7 & 10.

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1 Although Petitioner's Brief argues that the rule against contribution leaves open the possibility that some coconspirators may not be sued by a plaintiff because of collusion between the plaintiff and such coconspirators, Texas Industries does not and cannot

Texas Industries now asks this Court to create a contribution remedy which would divide Abraham's damages *per capita* among the four alleged coconspirators. Petitioner's Brief 22-7. If such a remedy were created, and if Abraham were to prove its claim against Texas Industries in the full amount of $600,000, Texas Industries' share of the damages would come to only $150,000, or $50,000 *less* than the $200,000 it got from Abraham in illegal overcharges. Texas Industries would come out $50,000 *ahead* on the whole deal! Here is how it would work:

Abraham's actual damages of $200,000 are trebled pursuant to Section 4 of the Clayton Act, resulting in total recoverable damages for Abraham of $600,000:

$$\begin{array}{r} \$200{,}000 \text{ actual damages} \\ \times 3 \\ \hline \$600{,}000 \text{ total damages} \end{array}$$

Under petitioner's *per capita* contribution theory, Abraham's total damages are then divided by the number of coconspirators to determine each coconspirator's share of the total damages:

$600,000	total damages
÷4	number of coconspirators
$150,000	each coconspirator's share of total damages

---

suggest that there has been any collusion in this case. On oral argument before the Fifth Circuit, counsel for petitioner readily conceded that there has been no collusion between Abraham and respondents.

Texas Industries' total illegal overcharges to Abraham, less its *per capita* share of total damages, equals its net illegal profit:

$200,000	illegal overcharges by Texas Industries
-150,000	Texas Industries' *per capita* share of total damages
$ 50,000	net illegal profit to Texas Industries

By spreading the cost of making restitution to Abraham among the three other coconspirators, who received *none* of the profits from overcharges to Abraham, Texas Industries would not only escape all liability for its overcharges to Abraham but would also actually wind up getting to *keep* fully one quarter of the illegal overcharges it received from Abraham.

Of the myriad descriptive terms that could be used to characterize Texas Industries' proposal, "fundamental fairness" is not among those that leap to the fore.

And yet the courts that have considered the rule against contribution in antitrust cases have recognized that, under certain circumstances, its application could appear to produce a harsh result. The opinions on this issue have therefore devoted considerable attention to setting forth the sound public policy considerations and the sound practical considerations which gave rise to the rule against contribution, and to explaining why these considerations have as much, if not more, vitality today than they did when the rule was first devised.

I. The Rule Against Contribution Under the Antitrust Laws is Based Upon Sound Public Policy

Since the case of *Merryweather v. Nixan*, 8 Term Rep. 186, 101 Eng. Rep. 1337 (K.B. 1799), common law courts have consistently held that no right of contribution exists among intentional tortfeasors. In the landmark decision of *Union Stock Yards Co. v. Chicago, Burlington and Quincy R.*, 196 U.S. 217 (1905), this Court declared:

> [T]he general principle of law is well settled that one of several wrongdoers cannot recover against another wrongdoer, although he may have been compelled to pay all the damages for the wrong done.
>
> 196 U.S. at 224.

This principle is rooted in society's unwillingness to put the machinery of the courts in motion to adjust equities between persons who have been engaged in unlawful action, or to relieve a culpable wrongdoer, even as against another wrongdoer equally liable, from the consequences of his unlawful act. *Best v. Yerkes*, 247 Iowa 800, 77 N.W.2d 23 (1956); *Gobble v. Bradford*, 226 Ala. 517, 147 So. 619 (1933); *Bailey v. Bussing*, 28 Conn. 455 (1859). By leaving such parties in the position in which it finds them, the law protects the pecuniary interests of the state and the rights of other litigants to unimpeded justice in the courts. *Fidelity & Casualty Co. v. Chapman*, 167 Or. 661, 120 P.2d 223 (1941). Moreover,

this principle has been traditionally regarded as an effective method of deterring potential wrongdoers from combining to commit wrongs, by imposing the risk upon each of responsibility for all the consequences of such wrongs. *City of Louisville v. Louisville Ry.*, 156 Ky. 141, 160 S.W. 771 (1913); *Thweate v. Jones*, 22 Va. (1 Rand) 328 (1823); *see generally* T. Cooley, LAW OF TORTS §171 (3d ed. 1906); 18 Am. Jur.2d §34.

The policy of preserving judicial resources for redress of injuries sustained by those who abide by the law is even more necessary today than it was two hundred years ago when the policy was first established. The public has too great an interest in the speedy and unhampered operation of the legal system to permit those who engage in unlawful actions to preempt judicial resources for enforcement of claims among themselves. Thus, the drafters of modern model legislation on the subjects of restitution and contribution have incorporated into such statutes general prohibitions against contribution among intentional tortfeasors. For example, the American Law Institute's Restatement of Restitution contains the following provision:

> Section 140. Criminal And Other Wrongful Conduct.
>
> A person may be prevented from obtaining restitution for a benefit because of his criminal or otherwise wrongful conduct in connection with the transaction on which his claim is based.
>
> Restatement of Restitution §140 (1937).

In the Introductory Note to Chapter 3 of the Restatement, this provision is explained in the following way:

> [A] person who has violated the law should not invoke it to obtain relief with reference to the same transaction; the burden to the public inseparable from litigation should be borne only for those who have obeyed the law; the denial of restitution will tend to prevent further misconduct.
>
> Restatement of Restitution, Introductory Note, Chap. 3 at 386 (1937).

Similarly, the Uniform Contribution Among Tortfeasors Act, which creates a right of contribution in negligence cases, nevertheless expressly provides that:

> There is no right of contribution in favor of any tortfeasor who has intentionally (wilfully or wantonly) caused or contributed to the injury.
>
> Uniform Contribution Among Tortfeasors Act, Section 1(b).

Nothing in the antitrust laws suggests the general rule against contribution was not intended to apply to antitrust cases. There is no provision for contribution in any antitrust statute, the only persons having a cause of action under such statutes being those injured by antitrust violations. 15 U.S.C. §§16, 26. Accordingly, with the exception of a divided panel of the Eighth Circuit in *Professional Beauty Supply, Inc. v. National Beauty Supply, Inc.*, 594 F.2d 1179 (8th Cir. 1979) (*"Professional Beauty"*) and an Arkansas federal district

court that was bound by the *Professional Beauty* decision,[2] *every* federal appellate and district court that has been asked to create a cause of action for contribution in an antitrust case has refused to do so.

Among the public policy grounds that have been advanced by these courts for rejecting contribution in an antitrust context are the following: (i) contribution would rob the plaintiff of control over his case; (ii) contribution would discourage settlements; and (iii) contribution would diminish the deterrent effect of the antitrust laws.

Plaintiff's Control of the Case

Abraham, the original plaintiff in this matter, now has a fairly simple and straightforward case to prosecute: it claims it was overcharged for concrete, and it has sued the company it says overcharged it to recover its damages. If Texas Industries is permitted to bring three other companies that never did business with Abraham into the litigation, it is obvious the proceedings will become significantly more complicated. Should these companies, in turn, choose to implead some or all of the sixteen other concrete suppliers in the New Orleans area — some of which did business with Abraham, and some of which did not — the proceedings would soon bear no resemblance at all to the uncomplicated claim Abraham set out to make.

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2 *Little Rock School Dist. v. Borden, Inc.*, 1980-1 Trade Cas. ¶ 63,059 (E.D. Ark. 1979).

Yet if contribution were permitted, every alleged coconspirator would have a compelling incentive to find some ground, no matter how flimsy, to bring as many additional parties into the litigation as possible, since each new coconspirator that is impleaded represents a potential reduction of the damages each coconspirator already in the case would be liable for in the event of a judgment.

The danger that, with contribution, a plaintiff could lose all control of the litigation it instituted was recognized in *Sabre Shipping Corp. v. American President Lines, Ltd.*, 298 F.Supp. 1339 (S.D.N.Y. 1969), the first case which presented an exhaustive analysis of the contribution problem in an antitrust context. The court there observed that:

> The private antitrust suit serves an important public purpose of presenting "an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws." (*Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 88 S.Ct. 1981, 20 L.Ed.2d 982.) If one or two defendants sued by a plaintiff, who alleged in this case it has been driven out of business, could turn around and implead all other persons directly and indirectly involved in the alleged conspiracy, it could well spell death to the plaintiff's suit and thus thwart the statutory purpose. Plaintiff's choice to sue those of the defendants it considers most culpable or most capable of making him whole

> would be totally nullified, and control of his action would be taken out of his hands.
>
> 298 F.Supp. at 1346.

Even the Eighth Circuit opinion in *Professional Beauty*, which chose to create a right of contribution among co-conspirators, was forced to acknowledge that the fear that "contribution would interfere with the plaintiff's ability to maintain control of his lawsuit . . . is indeed a legitimate one. . . ." 594 F.2d at 1184. Other courts, including the appellate court below, have likewise acknowledged this important consideration. *Wilson P. Abraham Construction Corp. v. Texas Industries, Inc.*, 604 F.2d 897 (5th Cir. 1979); *Alabama v. Blue Bird Body Co.*, No. 75-23-N (M.D. Ala. June 22, 1979); *El Camino Glass v. Sunglo Glass Co.*, 1977-1 Trade Cas. ¶ 61,533 (N.D. Cal. 1976).

These courts have also pointed out an additional but related concern. There is a long-standing policy of encouraging private antitrust litigation under Section 4 of the Clayton Act because of its importance as a "weapon of antitrust enforcement." *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). Loss of control by the plaintiff of his case as a result of contribution would undermine this important policy by deterring private plaintiffs of relatively limited means from bringing or maintaining a meritorious suit. Commenting on this problem, Judge Hanson in his dissenting opinion in the *Professional Beauty* case made the following observations:

> It is not difficult to conceive of many circumstances in which the original plaintiff may simply be overwhelmed by embroilment in a lawsuit of a scope and size it never contemplated and is ill-equipped to handle. Aware that litigation may spiral out of their control, it is foreseeable that some plaintiffs will forego a legitimate cause of action. Although district courts have the power to superintend complex litigation, the multiplication of issues and parties must, nevertheless, be dealt with. The chilling effect on the incentive to bring or pursue a lawsuit is unlikely to be diminished by the mere possibility of the favorable uses of district court discretion.
>
> *Professional Beauty*, 594 F.2d at 1190 (Hanson, J., dissenting in part), *quoted in part with approval in Wilson P. Abraham Construction Corporation v. Texas Industries, Inc.*, 604 F.2d at 905 and *Olson Farms, Inc. v. Safeway Stores, Inc.*, 1979-2 Trade Cas. ¶ 62,995 at 79,703 (10th Cir. 1979).

Settlement

One of the most obvious and significant problems with permitting contribution claims was succinctly stated by the court in *Sabre Shipping Corp. v. American President Lines, Ltd.*, 298 F.Supp. 1339, 1346 (S.D.N.Y. 1969): "no defendant would settle . . . if he was to find himself back in the suit as a third party defendant." 298 F.Supp. at 1346. Settling defendants demand finality; they want to know that payment of the settlement sum puts the litigation behind them once and for all.

Creation of a contribution remedy would rob settlements of such finality, unless all defendants could agree on a joint settlement with the plaintiff. But if even one defendant wished to try the case, all the other defendants would be forced to litigate it as well.

Such a result is clearly unacceptable, in view of the strong public interest in promoting settlements. *Cotton v. Hinton*, 559 F.2d 1326, 1330-31 (5th Cir. 1977); *Van Bronkhorst v. Safeco Corp.*, 529 F.2d 943, 950 (9th Cir. 1976); *Columbia Pictures Industries, Inc. v. Schneider*, 435 F.Supp. 742, 747 (S.D.N.Y. 1977), *aff'd*, 473 F.2d 1288 (2d Cir. 1978); *Weight Watchers of Philadelphia Inc. v. Weight Watchers International, Inc.*, 455 F.2d 770, 773 (2d Cir. 1972).

Deterrence

One of the primary objectives of the antitrust laws is the deterrence of future violations. *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). Both the Eighth Circuit in the *Professional Beauty* decision and the Fifth Circuit in the instant case considered the effects of the rule against contribution on the policy of deterrence. Candidly admitting that "the question of deterrence actually cuts both ways," the Eighth Circuit nevertheless concluded that on balance a rule allowing contribution would provide a greater deterrent than does the present no-contribution rule. 594 F.2d at 1185.

That conclusion ignores the realities of the business world. The deterrent effect of the antitrust laws must be assessed, not after the fact, but at the time the pro-

hibited action is contemplated. From this vantage it is clear that "a real threat of liability exists for all participants in the illegal scheme — any one of them [can be] selected as the defendant in the plaintiff's action." *Wilson P. Abraham Construction Corp. v. Texas Industries, Inc.*, 604 F.2d at 903 n. 11; *see also* Floyd, *Contribution Among Antitrust Violators: A Question of Legal Process*, 1980-2 B.Y.U.L. Rev. (to be published in February 1981).

In the instant case, the Fifth Circuit concluded that the very possibility of imposition of sole liability *enhances* the deterrent effect on potential violators:

> The chance that a participant may be faced with a full judgment is more likely to discourage anticompetitive conduct than would ensuring that each participant pays only some fair share. Allowance of contribution in effect ensures that the burden upon a particular defendant would be ameliorated by a division of liability.
>
> 604 F.2d at 901.

The Fifth Circuit substantiated its conclusion by relying upon prevailing economic theory, which holds that businessmen are "risk-averse": they are deterred more by a slight prospect of a large loss than by the strong prospect of a small loss. 604 F.2d at 901 n. 8. Even in commentary supporting *Professional Beauty's* decision to create a contribution cause of action in antitrust cases, it has been conceded that "the Fifth Circuit has the better of the deterrence argument." Syverud, *Contribution and Antitrust Theory*, 78 Mich. L. Rev. 890, 910 (1980).

Indeed, some courts have cautioned that the possibility of spreading losses attributable to treble damage awards among all antitrust conspirators may actually encourage antitrust violations. *Wilson P. Abraham Construction Corp. v. Texas Industries, Inc.*, 604 F.2d at 905; *Olson Farms, Inc. v. Safeway Stores, Inc.*, 1979-2 Trade Cas. at 79,703. Consider, as an example, an industry with a dozen competing companies. One of these companies is clearly dominant, with 45% of the market, and the other eleven each have 5% of the market. With *per capita* contribution, simple arithmetic shows it would make eminent good sense, from a profit maximization point of view, for the dominant company to urge a price-fixing scheme upon its competitors. Assuming the competitors went along (either out of fear of ruinous price cutting by the dominant company if they refused, or out of simple greed, or out of a combination of the two), the dominant company would reap 45% of the illegal profits and would only be liable for a little over 8%, trebled, if the conspiracy were discovered. If the conspiracy earned $100,000,000 in overcharges, the dominant company's share would be $45,000,000. Its maximum liability *after* trebling under a *per capita* rule would be just under $25,000,000. Even assuming criminal prosecution for the offense and imposition of the maximum criminal fine of $1,000,000 under 15 U.S.C. §1, the company would still retain $24,000,000 in illegal profits — a very substantial incentive to combine and conspire in violation of the antitrust laws.

Contribution and the Perma Life *Decision*

In the face of the foregoing vital public policy considerations that militate against contribution, petitioner nevertheless maintains that permitting contribution would not be inconsistent with antitrust policy, and it grounds this position upon a convoluted interpretation of the meaning of *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968).

In *Perma Life*, this Court held that the doctrine of *in pari delicto* did not bar a dealer who had been forced by his supplier to participate in a price-fixing agreement from bringing an antitrust action against his supplier. Petitioner takes the view that this decision entirely eliminated *in pari delicto* as a defense to an antitrust action. On the other hand, the Fifth Circuit in the instant case concluded, after a lengthy analysis of *Perma Life*, that the decision was directed to situations where plaintiffs are required by economic pressures to accept an illegal agreement, and that some aspects of the *in pari delicto* doctrine should be retained under the antitrust laws. *Wilson P. Abraham Construction Corp. v. Texas Industries, Inc.*, 604 F.2d at 902.

Petitioner reurges it own interpretation of *Perma Life* before this Court, and then builds upon it by maintaining that it would be inconsistent to permit a plaintiff with unclean hands to prosecute an antitrust action while denying a defendant the right to prosecute a contribution claim against his coconspirators:

> In thus rejecting *in pari delicto* as a defense to [an] antitrust claim, the Court made it clear that mere participation in an illegal scheme would not bar the participant from recovering three times the damages he sustained in the course of that participation.
>
> * * *
>
> If, as this Court stated in *Perma Life Mufflers*, the law encourages a suit by one "no less morally reprehensible than the defendant" in order to "further the overriding public policy in favor of competition", it is difficult to perceive any rationale that would support a rule denying petitioner the right to seek contribution in a situation where it finds itself the only party sued.
>
> Petitioner's Brief 21-22.

The rationale behind the rule is not so difficult to perceive as petitioner suggests. Deterrence was the motivating factor behind the *Perma Life* holding. As Texas Industries itself points out to this Court, *Perma Life* stresses that "the purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat *to deter anyone contemplating business behavior in violation of the antitrust laws.*" 392 U.S. at 139 (emphasis added), Petitioner's Brief 16 & 20.

Would this deterrence objective have been served in *Perma Life* if, in addition to denying the *in pari delicto* defense, this Court had accepted the argument petitioner advances here, and had also created a contribution remedy as the natural concomitant of the Court's hold-

ing on *in pari delicto?* Obviously not; the result would have been ludicrous in that case. The defendant supplier would not have been able to bar the plaintiff dealer's suit on the ground that the dealer participated in the conspiracy, but it *would* have been able to reduce its liability to the plaintiff dealer by asserting a contribution claim based upon the dealer's participation in the conspiracy.

And in some situations — such as the one now before the Court — contribution can do much more than just reduce the liability of the defendant. It can actually permit the defendant to escape liability altogether, and even to *keep* some of the illegal profits it received from the plaintiff. Petitioner Texas Industries would find itself in exactly that happy position if its claims for contribution were recognized by this Court.

The deterrence objective behind *Perma Life* would not even appear to countenance such a result, let alone compel it. The holding in *Perma Life* is intended to encourage suits by persons who have *standing* to sue under Section 4 of the Clayton Act; that is, *persons injured* in their business or property by antitrust violations. To cite this case for the proposition that it encourages those who are *liable* under Section 4 of the Clayton Act to escape liability by asserting contribution claims is to stand antitrust policy on its head.

For the reasons set forth above, sound antitrust policy simply cannot accommodate petitioner's proposed contribution remedy.

For other reasons that are just as compelling, antitrust practice cannot accommodate it, either.

II. Creation of a Right of Contribution Among Coconspirators Would Exacerbate Intolerably the Complexities of Antitrust Litigation

The Eighth Circuit in *Professional Beauty* expressed seemingly unbounded confidence in the abilities of trial courts to resolve the practical problems contribution would cause, with statements such as these:

> Without downplaying the seriousness of this fear [that contribution would interfere with the plaintiff's ability to maintain control of his lawsuit], we are confident that such problems can be avoided by the district court's prudent use of its power to sever where necessary to insure justice.
>
> * * *
>
> The problem of how to treat a joint tortfeasor who has settled in good faith is not present in this case. However, in the proper case the court should be able to fashion a rule of contribution which will protect the rights of settling defendants.
>
> * * *
>
> We reemphasize that district courts have the ability to sever issues and parties if the need arises.
>
> * * *
>
> We do not hold that contribution is available to all violators of the antitrust laws, regardless of the

> flagrancy of the conduct of the party seeking contribution. The decision of whether a particular party is entitled to contribution is best left to the trier of fact upon consideration of all of the circumstances of a case . . . .
>
> 594 F.2d at 1184-6.

It is interesting to note that the trial courts which have been confronted with the contribution issue have not been nearly so sanguine about their capacities to cope effectively with such problems. Only one such trial court was willing to grant contribution, and it did so only because it was in the Eighth Circuit and considered itself bound by the *Professional Beauty* decision. *Little Rock School Dist. v. Borden, Inc.*, 1980-1 Trade Cas. ¶ 63,059 (E.D. Ark. 1979). The other thirteen trial courts all denied contribution, and the increased complexities of administering such a rule was of major concern to these courts. Judge Singleton made this clear in his opinion in *In re Corrugated Container Antitrust Litigation*, 84 F.R.D. 40 (S.D. Tex. 1979):

> [C]omplications to the efficient management of a suit such as this would arise from the processing of the many possible crossclaims and impleader actions and from the fact that joint defense efforts, with their savings in court, staff, and attorney time, would be hindered or deterred altogether. The court has recently completed the trial of *United States of America v. International Paper, et al*, and *United States of America v. Boise Cascade, et al.*, D.C., 457 F.Supp. 571; those cases involved the prosecution

> of nine defendants with well-coordinated joint defense efforts. The trial lasted approximately fifteen weeks. It is difficult to judicially foresee how these cases, with the class and opt-out plaintiffs and thirty-seven defendants asserting cross-claims against each other, could be managed. Liberal use of severance would be required for trial, and that would lead to the consumption of courts' time in duplicative efforts. It seems to the court that a policy of allowing contribution would complicate litigation procedurally, frustrate settlements, and inhibit joint defense efforts to such an extent that this type of litigation would be virtually impossible to manage. Weighing the possible unfairness to a defendant such as Westvaco against the ills which would arise from contribution in such a case as this leads this court to the belief that contribution would be improper and undesirable. The court is also mindful of the arguments advanced by Judge Hanson in his dissent in *Professional Beauty Supply* that the problems attendant on such a rule would be likely to deter private plaintiffs from exercising their option to serve as private attorneys general in the antitrust area. 594 F.2d at 1189.
>
> 84 F.R.D. at 41.

Similarly, Judge Meanor in *Newark Motor Inn Corp. v. Holiday Inns, Inc.*, 1980-2 Trade Cas. 63,465 (D.N.J. 1980) observed that: "Implying a right to contribution has the potential for reordering the entire structure of antitrust litigation," which Judge Zirpoli in *El Camino*

Glass v. Sunglo Glass Co., 1977-1 Trade Cas. ¶ 61,533 (N.D. Cal. 1976) described as "already enormously complex."

Thus, in contrast with the Eighth Circuit's view, the district court bench appears to share the apprehensions, expressed by the Fifth Circuit in the instant case, that contribution "may open a Pandora's box of procedural problems, against which district court discretion may prove a palliation." 604 F.2d at 906. Respondents cannot say with any degree of certainty what is in that box, but here are a few of the readily foreseeable difficulties that would confront courts and counsel if contribution claims were permitted.

Defense Coordination

As a practical matter, coordinated defense efforts have become essential to processing modern complex antitrust litigation. The Manual for Complex Litigation recommends such coordination, and trial courts generally insist upon it. The existence of contribution claims would necessarily drastically reduce and probably eliminate altogether any coordinated joint defense efforts. Cross-claims could be filed by some or all defendants against all other defendants. Third-party claims could add new parties long after the original complaint was filed (as petitioner attempted to do here). Contribution complaints could even add additional claims or allegations, so long as such claims would reasonably fit within the plaintiff's complaint. *See, e.g., Getter v. R. G. Dickinson & Co.*, 366 F.Supp. 559 (S.D. Iowa 1973). In a multiparty antitrust case where

every party was adverse to every other party, the manageability problems brought on by the additional contribution pleadings, claims and discovery requests could reach nightmarish proportions during the pre-trial stage, and they would be even worse at trial.

The Innocent Defendant

The defendant who is guilty as Cain would never have a second thought about asserting a contribution claim; it would always be in his manifest best interest to do so. At the very least, contribution would lessen the impact of an adverse judgment by requiring him to pay only a portion of it. In some cases, like the one now before the Court, contribution could eliminate the effect of an adverse judgment altogether and even permit such a defendant to retain some of his illegal profits.

But contribution would place the innocent defendant in a real quandary. This is because virtually all antitrust cases are conspiracy cases, and the practical effect of a contribution claim in a conspiracy case is very different from its effect in, say, a negligence case. In a negligence case, there is at least no patent inconsistency in arguing to a jury that "I was not negligent; but if you should find that plaintiff's damages were caused by negligence, then a third party's negligence contributed to the damage and I am entitled to contribution from such third party." On the other hand, causation theory in antitrust conspiracy cases is founded upon a conscious concert of action between and among the co-conspirators. As Justice White explained in his concurring opinion in *Perma Life:*

> [A] third party proving an illegal undertaking between two defendants may recover for all damages caused by the combination. Those damages normally may be had from either or both defendants without regard to their relative responsibility for originating the combination or their different roles in effectuating its ends. This is because neither defendant, if he acted alone, could be charged with the violation; some degree of participation by both is essential to create a combination within the reach of section 1 of the Sherman Act. Either defendant is therefore deemed to have been a material cause of the damages, sufficient to permit a third party to recover.
>
> 392 U.S. at 144.

Because of this causation theory, a defendant who chooses to assert a contribution claim in an antitrust case would be faced with the prospect of having to present the following argument to a jury: "I did not combine and conspire with anyone to injure this plaintiff; but if you should find that I did, then I did it with A and B and C, who are in this thing as deep as I am, and I am entitled to contribution from them."

There can be no doubt that a jury would overlook the legal niceties of alternative pleading and conclude that the defendant must know whether he conspired and with whom he conspired, and if defendant thinks he is entitled to contribution from A and B and C, then he must have conspired with them in restraint of trade.

As a practical matter, then, the truly innocent defendant who wants to categorically and effectively maintain under oath that he did not conspire with anyone would have to forego making contribution claims, because they would inevitably undermine his credibility. The guilty defendant, on the other hand, would have no such qualms. He knows he will have to pay a judgment anyway, and contribution claims would reduce or even eradicate his exposure under Section 4 of the Clayton Act.

A contribution remedy would therefore be most frequently invoked by those least deserving of protection from the effects of treble damage awards.

Retrials

The Court in *Professional Beauty* suggested that severance could be used to deal with situations (such as that of the innocent defendant discussed above) where it would be undesirable to resolve cross-claims and third-party complaints in the same trial as the main demand. 594 F.2d at 1184-5. However, it must be remembered that basic due process prohibits anyone from being subjected to liability as the result of a judgment in an action to which he was not a party. So if a court should decide to sever third-party defendants for a separate trial of the contribution claims, such third-party defendants could not be bound by any judgment imposing liability in the original action.

In order to obtain contribution, the defendants in the original action would be forced to undertake a com-

plete retrial of the allegations of the original antitrust complaint — this time with themselves as plaintiffs — seeking to establish before a new jury that they were liable to the original plaintiffs, and that the third-party defendants were jointly liable for the same violations. *See* Floyd, *Contribution Among Antitrust Violators: A Question of Legal Process*, 1980-2 B.Y.U.L. Rev. (to be published in February 1981); W. Prosser, HANDBOOK OF THE LAW OF TORTS 309 (4th ed. 1971).

It is exceedingly unlikely that trial courts would be willing to use severance as a means of avoiding some of the problems contribution creates, when severance would result in duplicative retrials of complex antitrust actions. The recent case of *Newark Motor Inn Corp. v. Holiday Inns, Inc.*, 1980-2 Trade Cas. ¶ 63,465 (D.N.J. 1980), illustrates the disinclination of the district court bench to retry such massive litigation. In *Newark*, Holiday Inns, Inc. (HI) sought contribution from Newark Motor Inn Corp. (NMIC), based upon HI's payment of the entire judgment in a prior antitrust action. NMIC was never made a party to the prior action, but the court in that case found that HI had conspired with NMIC to deny the plaintiff a Holiday Inn franchise. The *Newark* court first held that there was no right of contribution among antitrust coconspirators, and then went on to make the following observation regarding retrial of the prior litigation:

> Finally, even if such a right existed in certain circumstances, I would not permit the assertion of the contribution remedy in this case. NMIC and its

principals were, at all times relevant to the antitrust case before Judge Garth, available and amenable to service of process. HI could have readily joined NMIC as a third party defendant in that case and asserted its contribution claim at that time. Having failed to do so, I would not permit HI to assert its claim in this case. To rule otherwise would result in relitigation of the same complicated case tried before Judge Garth. *No rational judicial system can tolerate manipulation of this sort.* Having made what appears to be a tactical or business decision to allow NMIC to stay out of the original antitrust case, HI should live with that decision.

¶ 63,465 at 76,458 (emphasis added).

The present burden of antitrust cases on the judiciary is a matter of such broad concern that Congress has recently passed legislation for the express purpose of expediting antitrust litigation. *See* Antitrust Procedural Improvements Act of 1980, S. 390, 96th Cong., 2d Sess. (1980). Successive retrials of antitrust cases, whether as a result of severance or the failure of plaintiffs to join some potentially liable parties in the original action, would increase the burden of such litigation to unacceptable levels.

Intentional Torts

Violations of the antitrust laws have traditionally been regarded as intentional torts. *See, e.g., Solomon v. Houston Corrugated Box Co.*, 526 F.2d 389, 392 n. 4 (5th Cir. 1976); *United States Dental Inst. v. American Ass'n of Ortho-*

dontists, 396 F.Supp. 565, 571 (N.D. Ill. 1975). There must be some consciousness of commitment to a common scheme, some concerted activity, before the defendants can be found liable. It has been noted that the very language in Section 1 of the Sherman Act suggests there cannot be an unintentional violation of the Act. Schwartz, Simpson & Arnold, *Contribution in Private Actions under the Federal Antitrust Laws*, 33 Sw. L. J. 799, 792-3 (1979); L. Sullivan, ANTITRUST 312 (1977).

However, there are *dicta* in both the *Professional Beauty* opinion and the opinion of the Fifth Circuit in the instant case that indicate there can be such a thing as an unintentional violation of the antitrust laws. *See* 594 F.2d at 1186, 1189 and 604 F.2d at 905. Such *dicta* appear to be contrary to this Court's observations in *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978). During the course of analyzing burden of proof requirements in criminal antitrust cases, the Court in *Gypsum* identified "four possible levels of intent — purpose, knowledge, recklessness and negligence . . . ," and then went on to comment that "[i]n dealing with the kinds of business decisions upon which the antitrust laws focus, the concepts of recklessness and negligence have no place." 438 U.S. at 455.

Petitioner Texas Industries shunts aside the suggestion made in *Professional Beauty* that a distinction could be drawn between intentional and unintentional antitrust violations by noting that "it is difficult to come to

grips with a workable definition of intentional or unintentional within the antitrust context." Petitioner's Brief 28. That is certainly true as a general proposition. But there can be no question whatever about the appropriate classification for the violation charged in the instant case. The antitrust offense alleged here is a horizontal agreement among competitors to fix prices. Complaint ¶ ¶ 5.1 & 5.2, J.A. 5-6. Of all the recognized categories of offenses arising under the antitrust laws, none is more clearly an intentional tort than horizontal price-fixing.

Should this Court alter the established rules of federal common law to permit Texas Industries to assert contribution claims in this case, then there would be no legal or logical impediment to the assertion of contribution claims under the federal common law in *any* intentional tort situation — not just in antitrust cases. The doors of the federal courts would be thrown open to a potential flood of claims by all sorts of intentional wrongdoers seeking ways to reduce the burdens the law imposes upon them for their misconduct.

Apportionment of Liability

Even petitioner concedes any ruling by this Court making contribution available among antitrust coconspirators would have to be reconcilable with the principle that settlement in civil antitrust litigation is to be encouraged:

> A contribution rule should be formulated that w[illegible]

> not adversely affect settlements. Plaintiffs must know the value of what they are releasing and settling defendants must be relieved of any further liability.
>
> * * *
>
> Encouragement of fair settlements is, of course, an objective in all disputes, not just those under the antitrust laws. With contribution, all parties will know where they stand. . . .
>
> Petitioner's Brief 26-7 & 19.

However, formulating a rule that would allow the parties to "know where they stand" necessarily involves devising some mechanism for apportioning liability among coconspirators, and that presents a fundamental problem. Texas Industries first attempts to avoid confronting it by lamely suggesting that:

> The precise method of apportionment could, of course, be left to the courts to be determined on a case by case basis, consistent with all of the relevant factors.
>
> Petitioner's Brief 22-3.

But it is obvious that litigants could not "know where they stand" if apportionment were determined on a case by case basis, and petitioner wisely appears to abandon the suggestion almost as soon as it is made.

Petitioner then focuses on two possible apportionment schemes, one based on comparative fault and the other based on *per capita* or *pro rata* allocation of lia-

bility.[3] No mention is made in petitioner's brief of a third possibility, that of apportioning liability on the basis of sales to plaintiffs, which is the most popular of the apportionment algorithms proposed by the *amicus curiae* briefs filed in support of petitioner's position.

One indisputable fact emerges from examination of these three proposals: there is no ready solution to the apportionment problem. This simple fact is further evidence of the wisdom of the present rule barring contribution in antitrust cases.

Little need be said here about apportionment based upon comparative fault, since the parties before the Court agree that it would be unworkable. Texas Industries puts it this way in its brief:

> Conversely, division of contribution upon a concept such as comparative fault could be more difficult for a plaintiff, or defendant, to quantify, and thus more likely to present obstacles to settlement. In order to know just what was being released, plaintiffs would have to measure the relative culpabilities of the defendants, which would require substantial evidence, and might not be ascertainable until after the trial itself.
>
> Petitioner's Brief 27.

It is actually not surprising that Texas Industries takes such a dim view of comparative fault apportion-

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3 Petitioner uses the terms *per capita* and *pro rata* interchangeably to mean division in equal parts.

ment. After all, the main demand in the case at bar will be tried to a jury. Complaint ¶ 11.1, J.A. 9. A jury would be likely to assign less importance to concepts of conspiracy theory than petitioner might like. Asked to render a decision based upon comparative fault, a jury could well conclude that since Texas Industries is the one that got all the money from plaintiff Abraham, Texas Industries should be the one to give it all back. Thus a comparative fault formula would be cold comfort to petitioner in this case.

On the other hand, *per capita* apportionment receives Texas Industries' enthusiastic endorsement since, as explained above, it would not only have the effect of relieving Texas Industries of any liability on the main demand against it, but would also actually allow Texas Industries to retain one quarter of any illegal profits it received.

However, the use of the arbitrary *per capita* formula for apportionment flatly contradicts the arguments for greater flexibility which petitioner advances in support of contribution itself. The *Professional Beauty* court was taken to task in a recent commentary for precisely this inconsistency:

> The court's choice of such a simplistic measure appears ironic in light of its rejection of administrative difficulties as a rationale for objecting to contribution. In fact, the court's major reasons for supporting contribution — fairness and equity — argue against the [*per capita*] measure.

Sellers, *Contribution in Antitrust Damage Actions*, 24 Vill. L. Rev. 829, 851-52 (1979).

Texas Industries does not deign to discuss apportionment according to sales to plaintiffs, the proposal endorsed by many of the *amicus curiae* briefs. That may be because such a rule has limited utility. Although it could be used in horizontal price-fixing cases, it could not be used in many other common antitrust cases, such as those involving claims of vertical restraints. Texas Industries may also be cognizant of the fact that apportionment according to sales to plaintiffs would entitle it to no recovery whatever on its third-party claims against respondents herein, since respondents never made any sales to the plaintiff.

In analyzing the apportionment problem, petitioner appears to have been impelled by logic and equity to the very solution that would offer it the greatest financial benefit. Of course, Texas Industries is not alone. For example, *amicus curiae* Olson Farms, Inc., applying no less logic than petitioner and striving for equity with no less vigor, concludes in its brief that apportionment should be made on the basis of sales to plaintiffs. Such a rule would peg its share of the total liability in the case of *Cackling Acres v. Olson Farms, Inc.*, 541 F.2d 242 (10th Cir. 1976), *cert. denied*, 429 U.S. 1122 (1977), at around 11% of the judgment. Under Texas Industries' *per capita* theory, however, Olson Farms would be liable for 20% of the judgment.

Other, similar examples can be drawn from the *amicus curiae* briefs. The differing positions taken in

these papers demonstrate that, insofar as apportionment is concerned, logic and equity are in the eyes of the beholder.

The wasteful litigation that creation of a contribution cause of action would spawn over this issue alone should be sufficient cause to deny petitioner's claim.

• • •

The foregoing compendium of problems that would arise out of creation of a contribution remedy is intended to be illustrative only. Because contribution cuts across so many facets of antitrust practice, ranging from its effects on the substantive law (its impact upon the statute of limitations, for example) to its effects on common procedures utilized in antitrust cases (it would probably end the practice of employing lead and liaison counsel), an exhaustive analysis of its potential repercussions is neither practical nor possible at this time. However, respondents submit that even just the most readily apparent practical consequences of creating a contribution cause of action constitute more than sufficient cause to reject the proposal. In *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), this Court held that indirect purchasers did not have a cause of action under Section 4 of the Clayton Act in part because of complications in proof which would result in attempting to divide damages between direct and indirect purchasers. According to the Court, one reason indirect purchasers had to be denied a cause of action was because of "the costs to the judicial sys-

tem and the efficient enforcement of the antitrust laws" imposed by the "complexities and uncertainties" raised by their claims. 431 U.S. at 732, 740-45. As the above discussion illustrates, the complexities and costs which would be imposed upon the federal court system by contribution claims in antitrust cases would be overwhelming. Thus practical considerations as well as policy considerations clearly dictate retention of the rule against contribution.

III. Judicial Action to Create a Right of Contribution Among Coconspirators is Inappropriate

Practical litigation and policy considerations virtually mandate maintaining the rule against contribution in antitrust actions. Yet even if these considerations were nonexistent, deference to Congress on the issue of contribution is appropriate in actions brought under the antitrust laws.

Deference To Congress

Despite the existence of long-standing maritime contribution rules, this Court's admiralty cases support deference to Congress when contribution claims are asserted in cases involving parties whose rights, duties and liabilities have been aligned by statute. In *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 343 U.S. 282, 285 (1952), for example, this Court recognized that "[i]n the absence of legislation, courts exercising a common law jurisdiction have generally held that they cannot on their own initiative create an enforceable right

of contribution as between joint tortfeasors." The Court contrasted this position with maritime jurisdiction, where courts have felt freer to fashion such rights. 343 U.S. at 285.[4] Nonetheless, because legislation had been passed affecting the obligations of the contribution defendant to the plaintiff in admiralty, the Court held that Congress should determine whether to allow contribution against that defendant:

> We have concluded that it would be unwise to attempt to fashion new judicial rules of contribution and that the solution of this problem should await congressional action. Congress has already enacted much legislation in the area of maritime personal injuries. . . . We think that legislative consideration and action can best bring about a fair accommodation of the diverse but related interests of these groups.
>
> 342 U.S. at 285-86 (footnotes omitted).

The continuing vitality of the *Halcyon Lines* principle of deferring to Congress on contribution-related rules when legislation involving the parties' rights exists was reemphasized last year in *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256 (1979). There the Court dealt with a challenge to a rule regarding the

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4 This Court has stated that "[a]dmiralty law is judge-made law," *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 259 (1979), and that "Congress has largely left to this Court the responsibility for fashioning the controlling rules of admiralty law." *United States v. Reliable Transfer Co.*, 421 U.S. 397, 409 (1975), *quoting from Fitzgerald v. United States Lines Co.*, 374 U.S. 16, 20 (1963).

method by which damages were divided in longshoremen's maritime tort suits. The case arose after the passage of legislation in which Congress had "aligned the rights and liabilities" of the parties involved in light of the preexisting admiralty rules. 443 U.S. at 272. This Court, citing *Halcyon Lines*, refused to change the existing rule because the proposed change might have disturbed the balance which Congress had struck in this area. 443 U.S. at 273.

The holdings in these cases support deference to Congress on contribution rights where legislation has been enacted, even in a court-made area of the law. This Court's precedent on the availability of causes of action in purely statutory contexts firmly supports such judicial deference.

Thus, for example, the absence of a statutory cause of action has been consistently fatal to causes of action sought by (i) persons who are not beneficiaries of the legislation involved, or (ii) beneficiaries of the legislation who are seeking a remedy other than the remedy implicitly or explicitly provided to them by the statute. *See, e.g., Transamerica Mortgage Advisors, Inc. v. Lewis*, 411 U.S. 11 (1979); *Piper Aircraft Co. v. Chris-Craft Industries, Inc.*, 430 U.S. 1 (1977). Here, petitioners are not seeking protection as beneficiaries of the antitrust laws, nor is the remedy in any way suggested by the language or legislative history of the antitrust laws. As this Court stated in *National Railroad Passenger Corp. v. National Association of Railroad Passengers*, 414 U.S. 453, 458 (1973):

> A frequently stated principle of statutory construction is that when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies. . . . This principle of statutory construction reflects an ancient maxim — *expressio unius est exclusio alterius.*

As in these cases, the total absence of any legislative support for a cause of action for contribution in the antitrust laws or their legislative history requires rejection of petitioner's claim. One district court put it this way:

> Congress, aware of the rule against contribution, saw fit to provide for it explicitly in the securities statutes but not in the enforcement of antitrust laws which dominate so much of our litigation. . . . [N]o such right should be implied.
>
> *Sabre Shipping Corp. v. American President Lines, Ltd.*, 298 F.Supp. at 1345.

See also Olson Farms, Inc. v. Safeway Stores, Inc., 1979-2 Trade Cas. at 79,701; *Wilson P. Abraham Construction Corp. v. Texas Industries, Inc.*, 604 F.2d at 903. The absence of a cause of action for contribution in the antitrust laws and of any reference to such a cause of action in their legislative history requires rejection of petitioner's claim.

The Appropriate Forum

Congressional review of contribution in each statutory area is particularly appropriate because Con-

gress is far better equipped to address the issue. Judicial review of contribution under each statute would entail almost certain inconsistency in results and heavy judicial burdens. The many views and divergent interests on the important social and economic policies affected by contribution in antitrust cases could be fully explored only if legislative review takes place. Such an evaluation process is clearly the business of elected officials rather than of the courts. *See,* Friendly, *The Gap in Lawmaking — Judges Who Can't & Legislators Who Won't,* 63 Colum. L. Rev. 787, 791-92 (1963).

As this Court stated in *United States v. Topco Associates, Inc.,* 405 U.S. 596, 611 (1972), such delicate judgments should be left to Congress:

> To analyse, interpret, and evaluate the myriad of competing interests and the endless data that would surely be brought to bear on such decisions, and to make the delicate judgment on the relative values to society of competitive areas of the economy, the judgment of the elected representatives of the people is required.

The two courts of appeals which have rejected contribution claims since *Professional Beauty* have felt that this "complex policy thicket" is appropriately reviewed by Congress:

> Before entering such a complex policy thicket, but recognizing a possible exception in the case of an unintentional violator, we believe this court should await a clear signal, at least, from the legis-

lative branch of our government on the matter. Certainly, the Congress, assisted by the resources of the executive branch, is in a far superior and more appropriate position to gauge the impact on observance and enforcement of the antitrust laws from contribution and its various facets of implementation. In this regard, we consider it salutary that the overwhelming majority of states in which a right of contribution exists among joint tortfeasors have provided for such a right by statute.

Olson Farms, Inc. v. Safeway Stores, Inc., 1979-2 Trade Cas. at 79,704.

Those aggrieved by this decision always have recourse to Congress, a forum better suited to evaluation of the competing interests and policies involved.

Wilson P. Abraham Construction Corp. v. Texas Industries, Inc., 604 F.2d at 906.

Congress is in a position of decided advantage over the judiciary in determining whether to maintain the present rule barring contribution or to alter the rule and permit such contribution. No contribution action should be recognized in any antitrust case in the absence of a Congressional directive to do so.

CONCLUSION

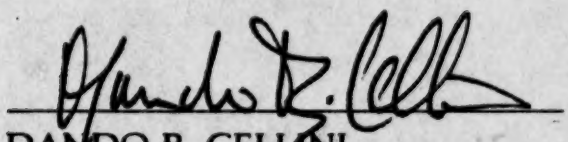
The Administrative Office of the United States Courts recently reported that there was an 18% increase in private antitrust filings during the twelve-month period ended June 30, 1980. CCH Trade Regu-

lation Reports Bulletin No. 462, November 3, 1980. This Court has often expressed its concern over the heavy burdens these cases impose on the federal court system. *See, e.g., Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 (Burger, C.J.), 345-46 (Rehnquist, J. concurring) (1979). Attorney General Benjamin Civiletti has also observed that antitrust cases are too lengthy, too costly and too complicated. *See* Address by Attorney General Benjamin Civiletti, American Bar Association, Section of Litigation (Chicago, November 10, 1979). In view of the widespread consternation over the present level of complexity in antitrust litigation, the creation of a whole new class of claims cognizable under the antitrust laws ought to be considered only for the most compelling of reasons. No such reasons have been advanced in support of petitioner's request here to create a cause of action for contribution.

The review presented above of the equitable principles, policy issues and practical considerations that bear upon this matter demonstrates that petitioner's argument is woven of gossamer; it offers no sound support for the radical change petitioner advocates. Moreover, the very presentation of petitioner's request in a judicial forum is contrary to substantial precedent that calls for deference to Congress on the merits of contribution.

Accordingly, respondents Radcliff Materials, Inc., Jimco, Inc. and OKC Dredging, Inc. urge this Honorable Court to affirm the judgment of the Fifth Circuit Court of Appeals in this case, holding there is no right to contribution under the antitrust laws.

Respectfully submitted,



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January 16, 1981

NO. 79-1144

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

TEXAS INDUSTRIES, INC., *Petitioner*

VERSUS

RADCLIFF MATERIALS, INC., JIMCO, INC. and OKC DREDGING, INC., *Respondents*

REPLY BRIEF FOR PETITIONER TEXAS INDUSTRIES, INC.

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TABLE OF CONTENTS

	PAGE
TABLE OF CASES AND OTHER AUTHORITIES	i, ii
ARGUMENT	1
I. WHETHER RESPONDENTS MADE SALES TO THE PARTICULAR PLAINTIFF IN THIS ACTION IS IMMATERIAL TO THE ISSUE BEFORE THE COURT	1
A. Civil Liability Under the Clayton Act Requires No Connexity of Sales Between the Plaintiff and the Defendant	1
B. Contribution Will Not Unduly Complicate Antitrust Litigation Nor Present Obstacles to a Valid Defense.	5
C. Apportionment of Contribution Should Not Be Based on Sales to a Particular Plaintiff.	7
II. THE GOVERNMENT'S POSITION IN THIS CASE IS INHERENTLY INCONSISTENT WITH ITS ENFORCEMENT ROLE, THE OBJECTIVES OF THE ANTITRUST LAWS, AND PREVIOUSLY STATED POSITIONS OF THE JUSTICE DEPARTMENT.	9
CONCLUSION	14

TABLE OF CASES AND OTHER AUTHORITIES

PAGE

Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977) 11

Chattanooga Foundry & Pipeworks v. City of Atlanta, 127 F. 23 (6th Cir. 1903), *affirmed*, 203 U.S. 390 (1906) 3, 7, 8

Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 88 S. Ct. 2224 (1968) 6, 7, 11

Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977) .. 6, 11

Northwestern Oil Co. v. Socony-Vacuum Oil Company, 138 F.2d 967 (7th Cir. 1944), *cert. den.*, 321 U.S. 792 (1944) 4, 7, 8

Pfizer, Inc. v. Government of India, 434 U.S. 308 (1978) 6, 11

Twentieth Century Fox Film Corporation v. Goldwyn, 328 F.2d 190 (9th Cir. 1964), *cert. den.*, 379 U.S. 880 (1964) 4, 7, 8

OTHER AUTHORITIES:

Antitrust Equal Enforcement Act of 1979; Hearing on S.1463 Before the Sub-Committee on Antitrust, Monopoly and Business Rights on the Judiciary, 96th Cong., 1st Sess. June 8, 1979 . 13

Clayton Act 5, 7, 9

Sherman Act 2

NO. 79-1144

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

TEXAS INDUSTRIES, INC., *Petitioner*

VERSUS

RADCLIFF MATERIALS, INC., JIMCO, INC. and OKC DREDGING, INC., *Respondents*

REPLY BRIEF FOR PETITIONER TEXAS INDUSTRIES, INC.

ARGUMENT

I. WHETHER RESPONDENTS MADE SALES TO THE PARTICULAR PLAINTIFF IN THIS ACTION IS IMMATERIAL TO THE ISSUE BEFORE THE COURT.

A. Civil Liability Under the Clayton Act Requires No Connexity of Sales Between the Plaintiff and the Defendant.

Respondents have, throughout their brief, evaded addressing the real policy considerations relevant to

the issue before the Court and, instead, have attempted to focus the Court's attention on the peculiar and purely fortuitous facts of this case. The limited discovery thus far conducted in the District Court, consisting of interrogatories and one document production, indicate that the respondents apparently made no sales directly to plaintiff Wilson P. Abraham Construction Company. Petitioner, and some of the other New Orleans based ready-mix concrete companies, apparently made all of the sales for which damages are claimed.

At the outset, the fact that a particular ready-mix concrete consumer purchases from a limited number of sources reflects nothing unusual within a ready-mix concrete market, where the ultimate consumer typically purchases much of his concrete needs from the sources located nearest the job site. This is so because one of the key pricing factors of ready-mix concrete is the distance it must be delivered. However, respondents, in attempting to focus on the peculiar facts of this case, overlook the fact that for there to be an actionable wrong under Section 1 of the Sherman Act, violation of which is alleged here, there must be an illegal conspiracy or combination. Before petitioner can be found liable for an antitrust infraction, as alleged by the plaintiff, Abraham, it must be found to have entered into an unlawful combination or conspiracy that resulted in economic damage to the plaintiff. Respondents also overlook the fact that for them to be liable for contribution, they, too, must be found to have entered into the same unlawful combination with petitioner. Thus, the fact that this particular plaintiff may have made no purchases directly from the respondents is purely fortuitous and immaterial to the issue before the Court.

As long ago as 1906, this Court affirmed a decision

by the Sixth Circuit Court of Appeal allowing the plaintiff to recover treble damages resulting from an illegal combination even though the person from whom plaintiff made its purchases was not made a defendant in the action. *Chattanooga Foundry & Pipeworks v. City of Atlanta,* 127 F. 23 (6th Cir. 1903), *affirmed,* 203 U.S. 390 (1906).

In that case, plaintiff, the City of Atlanta, purchased pipe from an Alabama corporation at a price fixed by reason of illegal arrangements between members of a trust, to which the defendants belonged. The Alabama corporation was not sued. The principal question decided by this Court dealt with a statute of limitations issue, but the Court of Appeal specifically addressed the significance of the absent seller:

> That there was evidence tending to show that the plaintiff had been compelled to pay an unreasonable price for the pipe which it bought during the continuance of the unlawful combination complained of is not to be disputed. That its purchases were made exclusively from the Anniston Pipe Company, a corporation doing business in Alabama, and that it is not suing that corporation, is of no vital significance.

127 F. at 25.

> We have, then, a direct action by this plaintiff against two of the members of this unlawful combine. That there was no purchase made direct from either of them is of no importance. *Their guilt is as great as that of the Alabama corporation from whom the plaintiff did buy its pipe.* If the agreement between the defendants and their associates was unlawful and tortious, each is responsible for the torts committed in the course of the illegal

combination.

127 F. at 26 (emphasis added).

Later, in *Northwestern Oil Co. v. Socony-Vacuum Oil Company,* 138 F.2d 967 (7th Cir. 1944), *cert. den.,* 321 U.S. 792 (1944), it was observed that:

> The one complaining need not sue the person to whom he has paid the illegal prices. *He may recover from any member of the conspiracy,* if he shows that the direct effect is to injure him in his business or property and produces facts from which such injury may be ascertained.

138 F.2d at 971 (emphasis added).

And, in *Twentieth Century Fox Film Corporation v. Goldwyn,* 328 F.2d 190 (9th Cir. 1964), *cert. den.,* 379 U.S. 880 (1964), where it was found that a particular defendant was a participant in an unlawful combination, that defendant was forced to share the responsibility for all resulting damages, *including those occasioned by activity in which it did not directly participate or directly benefit.* 328 F.2d at 212.

Respondents also decline to point out to the Court that the instant case is not the only civil litigation to arise out of the matters alleged in the indictment. While the criminal action instituted against petitioner and respondents was pending, seven other plaintiffs filed suit in Civil Action No. 73-419 in the Eastern District of Louisiana naming petitioner and respondents as defendants and alleging illegal acts and violations virtually identical to those alleged below by Wilson P. Abraham Construction Corp. That civil action was concluded as to all defendants by compromise. The fortuitous fact, if it turns out to be so, that Wilson P. Abraham Construction Corp. made no purchases from

the respondents is thus of absolutely no consequence to the issue before this Court.

B. Contribution Will Not Unduly Complicate Antitrust Litigation Nor Present Obstacles To A Valid Defense.

Continuing with their rationale that the peculiar facts of this case argue against recognition of a right of contribution under the antitrust laws, respondents say that such a right will significantly complicate litigation and create a dilemma for the innocent defendant.

Respondents suggest that if Texas Industries is permitted to bring into the litigation "three companies that never did business with Abraham" (respondents brief p. 14), the proceedings will become significantly more complicated. They go on to suggest that should these three companies in turn choose to implead all of the other concrete suppliers in New Orleans, "some of which did business with Abraham, and some of which did not" (respondents brief p. 14), the suit would bear no resemblance to the claim Abraham set out to make.

Aside from the fact that connexity of sales between defendants and plaintiffs is immaterial for purposes of liability under the Clayton Act, as discussed above in Section A, the position asserted by respondents clearly implies that parties will, if a right of contribution is recognized, implead unlimited numbers of other parties, even where there exist no facts on which to assert such claims. Addressing respondents' argument here on their own terms, and looking at the peculiar facts of this case, there appears to be little likelihood, in view of the previous grand jury investigation, government criminal prosecution and civil action, that respondents would implead every ready-mix concrete supplier in

New Orleans. Any threat of innocent parties being brought into complex litigation would more likely come in the initial suit itself, where a plaintiff typically has little information aside from what can be gleaned from the indictment itself.

Moreover, in suggesting that contribution would place the innocent defendant in a quandry by forcing him to argue that he engaged in no unlawful combination on the one hand but that, if he did, it was with other specific parties is to suggest that the judicial system in the United States is ineffective in protecting the rights of innocent parties. If the truly innocent party could prevail if sued directly by a plaintiff, it could just as well prevail if sued for contribution. In short, there would simply be no reason for the innocent defendant to make an alternative plea for contribution unless and until it was cast in judgment.

The logic behind respondents' argument in this regard is far less compelling than the reverse of it: if parties impleaded for contribution did in fact enter into the same unlawful combination as did those seeking contribution, such parties *should* be before the Courts in order to ensure that none keep their illegal gains and escape liability. This Court has repeatedly expressed that as one of the clear objectives of the antitrust laws. *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 494 (1968). *Illinois Brick Co. v. Illinois,* 431 U.S. 720, 726 (1977). *Pfizer, Inc. v. Government of India,* 434 U.S. 308, 314 (1978).

Respondents attempt to portray Texas Industries' motive in seeking contribution as one that will enable it to keep illegal profits. (Respondents' brief pps. 9-10, 23, 37). It goes without saying that Texas Industries is seeking contribution in order to spread liability among those who allegedly conspired with it in order to reduce

potential exposure should it be found liable to Abraham. However, respondents' assertion in this regard overlooks the fact that *only* where a right of contribution exists is there an assurance that those who illegally combine will be deprived of the fruits of their unlawful acts.[1]

As *Chattanooga Foundry & Pipeworks v. City of Atlanta, supra, Twentieth Century Fox Film Corp. v. Goldwyn, supra,* and *Northwestern Oil Co. v. Socony-Vacuum Oil Co., supra,* make clear, it is immaterial whether a particular plaintiff makes purchases from all who jointly created the liability in the first place. Were the peculiar facts of this case reversed, with Wilson P. Abraham Construction Corp. seeking recovery solely from the respondents, they in turn would be seeking contribution from petitioner.[2]

C. Apportionment of Contribution Should Not Be Based On Sales to a Particular Plaintiff.

Without proposing that apportionment under a contribution rule be based upon sales, respondents

---

1/ In the typical case, as was true in Civil Action No. 73-419 in the Eastern District of Louisiana, the plaintiff will sue all who allegedly combine, but where less than all are sued, contribution ensures that all parties are brought before the Court for a determination and apportionment of liability.

2/ It should be observed that, in light of the treble damages provisions of the Clayton Act, respondents' mathematical formula, displayed at pages 9 and 10 of their brief, works only where there are four or more who unlawfully combine. The fortuitousness of this mathematical formula is further evidence of the immateriality of a connexity of sales between plaintiffs and defendants.

again focus on the peculiar facts of this case and suggest that *petitioner* does not urge application of such a formula since respondents made no sales to Abraham. At the outset, it should be noted that petitioner has not suggested application of any specific formula; it has merely observed various considerations under a *per capita* or comparative formula while noting that since contribution itself is an equitable doctrine, the courts may be able to fashion such appropriate rules of contribution as are necessary to achieve fairness between the parties and preserve manageability of litigation.

Apportionment based on sales to a particular plaintiff would be inherently inconsistent with *Chattanooga Foundry & Pipeworks v. City of Atlanta, supra, Twentieth Century Fox v. Goldwyn, supra,* and *Northwestern Oil Co. v. Socony-Vacuum Oil Co., supra,* which make it clear that sales between a plaintiff and a defendant are immaterial to liability under the antitrust laws. If, as respondents suggest throughout their brief, the fact that plaintiff Abraham made no purchases from them is *material* to the question of contribution, then facts such as those peculiar to this case would result in an actual defense to antitrust liability. Clearly, had Abraham chosen to sue the respondents they could not escape liability by showing the absence of sales by them.

Moreover, for sales to be the appropriate formula, additional considerations would have to be given to whether the appropriate basis would be sales to a particular plaintiff (e.g., sales to Wilson P. Abraham Construction Corp. under the facts of this case) or percentage of sales in the affected market (e.g., the New Orleans ready-mix concrete market). The latter would, of course, be less fortuitous in application, since it would not be governed by the circumstances of a par-

ticular plaintiff, but it would be far more complex and time-consuming to define and determine.

Finally, application of a sales-related formula would be possible only in horizontal price-fixing cases. This would mean creation of different formulas or standards in apportioning liability for antitrust violations arising out of, for example, cases alleging monopoly, group-boycotts, vertical price-fixing or other restraints and the like.

II. THE GOVERNMENT'S POSITION IN THIS CASE IS INHERENTLY INCONSISTENT WITH ITS ENFORCEMENT ROLE, THE OBJECTIVES OF THE ANTITRUST LAWS, AND PREVIOUSLY STATED POSITIONS OF THE JUSTICE DEPARTMENT.

In its *amicus* brief, on page 1, the United States declares that it has the primary responsibility for enforcing the antitrust laws and defines its interest in the matter before the Court as that of insuring the continuing efficacy and deterrent effect of private sections of the Clayton Act. It says, at page 21-22, that: "... fairness to the public demands that those who behave in intentional violation of the law feel the *full consequences* of their misdeeds." (emphasis added).

In 1973 the United States Justice Department conducted a grand jury investigation in the Eastern District of Louisiana that eventually led to the indictment of petitioner, respondents and certain of their employees. All were eventually convicted on *nolo contendere* pleas. Thus, consistent with the statement made in its *amicus* brief concerning the notion of fairness demanded by the public, the United States

Government pursued both petitioner and respondents criminally, and all felt the full consequences of their alleged misdeeds, including fines to the corporate defendants and prison sentences to the employees.

Now, in the matter before the Court, the United States Government takes the position that even though the respondents were investigated, criminally prosecuted and sentenced upon conviction, they should not now be compelled to pay, by way of contribution, any damages assessed against petitioner on the basis of a finding of liability that can be possible only upon a showing of their joint culpability. This position is inherently inconsistent with the stated role of the government as primary enforcer of the antitrust laws and its declaration that fairness to the public demands that those who violate the law bear the full consequences of their misdeeds.

The government supports its position in large part by arguing that a no-contribution rule would provide greater deterrence under the antitrust laws than would a rule allowing contribution, though at the outset it concedes that:

> At present, there is little empirical evidence bearing on the question whether contribution would weaken or strengthen deterrence, or leave it unaffected. Clashing assertions have been made by federal judges, members of Congress, participants in congressional hearings, and commentators. To the extent that any consensus can be drawn from these disparate views, it is that neither economic theory nor other available tools of analysis provide an unambiguous answer.

(United States *amicus* brief, p. 11-12).

It premises its argument that deterrence is better

served by a rule against contribution by saying that the decisions of this Court establish that Congress had a two-fold purpose in prescribing a private treble damage remedy under the antitrust laws. The two-fold purpose is defined by the government as (1) to compensate the victim of antitrust violations and (2) to deter potential offenders, citing *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), and *Pfizer, Inc. v. Government of India, supra.* (*Amicus* brief p. 10). The government concludes that "...petitioner has wholly failed to demonstrate that an implied contribution remedy is 'necessary to effectuate Congress' goals' under the antitrust laws." (*Amicus* brief p. 10).

In presenting this argument to the Court, the government has totally ignored the existence of another objective of the antitrust laws, recognized by this Court in both *Brunswick* and *Pfizer* as well as *Illinois Brick Co. v. Illinois, supra,* and *Hanover Shoe Inc. v. United Shoe Machinery Corp., supra;* the objective of penalizing the wrong-doer by depriving him of the fruits of his illegal acts. In *Pfizer,* this Court said:

> The Court has noted that §4 has two purposes: to deter violators and *deprive them of 'the fruits of their illegality'* and 'to compensate victims of antitrust violations for their injuries.'

434 U.S. 314 (emphasis added).

In *Brunswick,* the Court recognized that:

> Of course, treble damages also play an important role in *penalizing wrongdoers* and deterring wrongdoing, as we also have frequently observed.

429 U.S. at 485 (emphasis added).

The significance of this objective of the antitrust laws was expressed by the Court in *Hanover Shoe,*

where it said:

> In addition, if buyers are subjected to the passing-on defense, those who buy from them would also have to meet the challenge that they passed on the higher price to *their* customers. These ultimate consumers, in today's case the buyers of single pairs of shoes, would have only a tiny stake in a lawsuit and little interest in attempting a class action. In consequence, *those who violate the antitrust laws by price fixing or monopolizing would retain the fruits of their illegality* because no one was available who would bring suit against them. *Treble-damage actions, the importance of which the Court has many times emphasized, would be substantially reduced in effectiveness.*

392 U.S. at 494 (emphasis added).

To a large extent, deterrence is achieved by virtue of the criminal and treble damage sanctions of the law, but *only* where a right to contribution is recognized can there be an assurance that violators will be deprived of the fruits of their illegal acts. Contrary to the government's assertions, petitioner has demonstrated that contribution is a necessary adjunct to achieve congressional goals under the antitrust laws.

The position of the United States Government here in opposing a right to contribution is also internally inconsistent. At page 22 of its *amicus* brief, the government concludes that:

> Moreover, quite apart from the public injury resulting from price fixing and the need to maximize deterrence in such cases, *it is fair to require any participant in the conspiracy to make good the damages caused by the conspiracy since participation by*

each member often is essential to produce the injury. (Emphasis added).

Though it did refer to certain specific testimony given by Assistant Attorney General John Shenefield in hearings before the Senate Judiciary Committee on Bill No. 1468, the Antitrust Equal Enforcement Amendment of 1979, the government fails to mention that at the outset of his testimony, Mr. Shenefield noted that: ". . .Judge Bell has asked that I tell you and the subcommittee that he is generally in favor of contribution among joint tortfeasors based on a fair share allocation of damages, with a right of recover over." (Antitrust Equal Enforcement Act of 1979; Hearings on S.1468 Before the Sub-Committee on Antitrust, Monopoly and Business Rights of the Senate Committee on the Judiciary, 96th Cong., 1st Sess. June 8, 1979, p. 4).

Additional testimony given by Mr. Shenefield, not referred to by the government in its *amicus* brief, is as follows:

> Contribution grew up in our law in order to somehow spread the risk of liability among all defendants and not allow one defendant to pay more than his fair, proportionate share.
>
> * * *
>
> All of us, I assume, are concerned about the question of fairness in all of the several aspects that arise in this general area. We are also concerned with fairness among defendants, and we are concerned with fairness between defendants on the one hand and plaintiffs on the other. I suppose, in a sense, we are also concerned with fairness to the public and to the criminal justice system.

> Arguments based on fairness demand important consideration, and that is why this proposal, based as it is upon fairness considerations, demands serious consideration.
>
> * * *
>
> It is quite clear, I think, *that it is unfair for any one of several parties who are jointly responsible for antitrust damages to pay more than their fair share,* defined in some way, of those damages. *Contribution,* in this context, would help to prevent that kind of a result.

(Hearings on S.1468, *supra,* at p. 5) (emphasis added).

The inconsistency of the government's position before the Senate Judiciary Committee and that taken here is inexplicable. The statements of Mr. Shenefield before the Senate Committee are, however, plainly more consistent with basic principles of fundamental fairness.

CONCLUSION

Petitioner, Texas Industries, Inc., respectfully requests the Court to reverse the judgment of the Court of Appeal for the Fifth Circuit and to remand the case to the district court for further proceedings with instructions to recognize petitioner's right to contribution under the antitrust laws.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

TEXAS INDUSTRIES, INC., *Petitioner,*

v.

RADCLIFF MATERIALS, INC., JIMCO., INC., AND OKC DREDGING, INC., *Respondent.*

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN SUPPORT OF RESPONDENTS BY A. L. BLACK AND DARRELL CAMERON AS AMICI CURIAE

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QUESTION PRESENTED

Whether defendants in federal antitrust actions have a right to seek contribution.

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ii

INTEREST OF AMICI CURIAE 2

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. Contribution Eliminates The Deterrence Factor Created By Congress 4

A. The Threat of Sole Liability for Treble Damages Is the Most Effective Deterrent .. 4

B. Contribution Will Be an Effective Means of Assuring Adherence to the Terms of the Illegal Contract, Combination or Conspiracy 7

II. Contribution Would Inhibit Settlement Negotiations 9

A. This Court Promotes Settlement of Complex Antitrust Litigation 9

B. The No-Contribution Rule Encourages Swift and Inexpensive Determination of the Litigation 12

III. Contribution Gives Rise to Complexity and Unmanageability in Antitrust Litigation, Impeding the Goals of Congress 14

A. A Right to Contribution Would Restrain Manageability, Fostering Abandonment of the Role of Private Attorneys-General 14

B. Contribtuion Gives Rise to Illusory "Fairness" 17

IV. This Court Should Defer to Congress the Decision of the Appropriateness of Creating a New Rule Permitting Contribution 18

CONCLUSION 21

CERTIFICATE OF SERVICE 22

TABLE OF AUTHORITIES

CASES: PAGE

Wilson P. Abraham Construction Corp. v. *Texas Industries, Inc.*, 604 F.2d 897 (5th Cir. 1979), *rehearing and rehearing en banc denied* (5th Cir. Nov. 29, 1979) 3-4, 5, 6, 19

In re Ampicillin Antitrust Litigation, 82 F.R.D. 647 (D.D.C. 1979) 14

Baughman v. *Cooper-Jarrett, Inc.*, 391 F.Supp. 671 (W.D.Pa. 1975), *rev'd in part on other grounds*, 530 F.2d 529 (3d Cir. 1976), *cert. denied*, 429 U.S. 825 (1976) 20

In re Beef Industry Antitrust Litigation, M.D.L. Docket No. 248 (N.D.Tex.)..... 19

In re Beef Industry Antitrust Litigation, 1980-1 Trade Cases (CCH) ¶ 60,021, *en banc hearing denied* (5th Cir. Dec. 21, 1979) 2

A. L. Black v. *Albertson's, Inc.*, CA2-75-186 (N.D.Tex. filed Dec. 30, 1975)..... 2

Blue Chip Stamps v. *Manor Drug Stores*, 421 U.S. 723 (1975) 20

Darrell Cameron v. *Iowa Beef Processors, Inc.*, 77-192-2 (S.D. Iowa filed July 1, 1977)..... 2

Columbia Pictures Industries, Inc. v. *Schneider*, 435 F.Supp. 742 (S.D.N.Y. 1977), *aff'd*, 573 F.2d 1288 (2d Cir. 1978)..... 9

In re Corrugated Container Antitrust Litigation, 84 F.R.D. 40 (S.D.Tex. 1979) 16

Cotton v. *Hinton*, 559 F.2d 1326 (5th Cir. 1977) 9, 12, 16

El Camino Glass v. *Sunglo Glass Co.*, 1977-1 Trade Cases (CCH) ¶ 61,533 (N.D.Cal. 1976) 5, 14-15

Flintkote Co. v. *Lysford*, 246 F.2d 368 (9th Cir.), *cert. denied*, 355 U.S. 835 (1957)..... 13

Florida Trailer Equipment Co. v. *Deal*, 284 F.2d 567 (5th Cir. 1960) 13

Table of Authorities Continued

CASES:	PAGE
Goldlawr, Inc. v. *Shubert*, 276 F.2d 614 (3d Cir. 1960)	5
Gomes v. *Broadhurst*, 394 F.2d 456 (3d Cir. 1968)	10
Halcyon Lines v. *Haenn Ship Sealing & Refitting Corp.*, 342 U.S. 282 (1952)	18
Illinois Brick Co. v. *Illinois*, 431 U.S. 720 (1977)	15, 16
Iowa Beef Processors, Inc. v. *Meat Price Investigators Association*, No. 79-1214 (U.S. filed Feb. 6, 1980)	3
Leger v. *Drilling Well Control, Inc.*, 592 F.2d 1246 (5th Cir. 1979)	10, 12
Martello v. *Hawley*, 300 F.2d 721 (D.C. Cir. 1962)	10
Miller v. *Republic National Life Insurance Co.*, 559 F.2d 426 (5th Cir. 1977)	12
National Railroad Passenger Corp. v. *National Association of Railroad Passengers*, 414 U.S. 453 (1974)	20
Olson Farms, Inc. v. *Safeway Stores, Inc.*, 1979-2 Trade Cases (CCH) ¶ 62,995 (10th Cir.) *en banc rehearing granted* (10th Cir. Dec. 27, 1979)	5, 16, 20
Perma Life Mufflers, Inc. v. *International Parts Co.*, 392 U.S. 134 (1968)	15
Pfizer v. *Government of India*, 434 U.S. 308 (1978)	17
Professional Beauty Supply, Inc. v. *National Beauty Supply, Inc.*, 594 F.2d 1179 (8th Cir. 1979)	5, 10, 15
Reiter v. *Sonotone Corp.*, ____ U.S. ____, 99 S.Ct. 2326 (1979)	19, 20
Sabre Shipping Corp. v. *American President Lines Ltd.*, 298 F.Supp. 1339 (S.D.N.Y. 1969)	5, 9, 14, 15, 17, 19
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Table of Authorities Continued

CASES: PAGE

Transamerica Mortgage Advisors, Inc. v. *Lewis*, _____ U.S. _____, 100 S.Ct. 242 (1979) 20

Van Bronkhurst v. *Safeco Corp.*, 529 F.2d 943 (9th Cir. 1976) 9

Weight Watchers of Philadelphia, Inc. v. *Weight Watchers International, Inc.*, 455 F.2d 770 (2d Cir. 1972) 9, 13

Williams v. *First National Bank*, 216 U.S. 582 (1910) ... 12

Zenith Radio Corp. v. *Hazeltin Research, Inc.*, 401 U.S. 321, *reh. denied*, 401 U.S. 1015 (1971) 9

STATUTES:

Clayton Act §4 (15 U.S.C. §16 [1976]) 19

FED. R. CIV. P. 1 14

OTHER AUTHORITIES:

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, FEDERAL JUDICIAL WORKLOAD STATISTICS Table C-4 (1978) 13

AUSTIN, *Negative Effects of Treble Damage Actions: Reflections on the New Antitrust Strategy*, 1978 DUKE L. J. 1353 5

Brief of Amicus Curiae Westvaco Corporation, *Texas Industries, Inc.* v. *Radcliff Industries, Inc.*, No. 79-1144 (U.S. filed Dec. 16, 1980) 10

K. ELIZINGA & W. BREIT, THE ANTITRUST REMEDIES (1976) 5

In Pari Delicto and the Deterrence of Antitrust Violation, 62 MINN. L. REV. 59 (1977) 5

IZARD & MILLER, *High Price-Fixing Rewards Require Abolition of Joint, Several Liability*, 1 NAT'L L. J. 22 (Aug. 27, 1979) 16

Table of Authorities Continued

OTHER AUTHORITIES:	PAGE
MANUAL FOR COMPLEX LITIGATION (1977)	10, 13
Note, *Contribution in Private Antitrust Suits*, 63 CORNELL L. REV. 682 (1978)	5
POSNER, ANTITRUST — CASES, ECONOMIC NOTES AND OTHER MATERIALS (1974)	7-8
Senate Comm. on the Judiciary, Hearings on S. 1468 Before the Subcomm. on Antitrust, Monopoly and Business Rights, The Antitrust Equal Enforcement Act of 1979, 96th Cong., 1st Sess. 45 (1979)	11
Senate Comm. on the Judiciary, Report on S. 1468 by the Comm., the Antitrust Equal Enforcement Act of 1979, 96th Cong., 1st Sess. 36 (1979)	11
SULLIVAN, ANTITRUST (1977)	8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 79-1144

TEXAS INDUSTRIES, INC., *Petitioner,*

v.

RADCLIFF MATERIALS, INC.,
JIMCO., INC., AND OKC DREDGING, INC., *Respondent.*

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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BRIEF IN SUPPORT OF RESPONDENTS BY A. L. BLACK AND DARRELL CAMERON AS AMICI CURIAE

A. L. Black and Darrell Cameron submit this Brief as *amici curiae* with the consent of all parties hereto.[1] A. L. Black and Darrell Cameron urge this Court to follow the intent of the antitrust laws and deny the use of contribution and claim reduction[2] by defendants in antitrust cases.

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[1] A. L. Black and Darrell Cameron submit with this Brief four letters of consent, one from each of the parties to this appeal.

[2] For the sake of brevity, when the issue of contribution is discussed, it is assumed to include the issue of claim reduction.

INTEREST OF AMICI CURIAE

A. L. Black and Darrell Cameron are two of numerous plaintiffs who are fat-cattle producers-sellers involved in antitrust actions coordinated for discovery purposes before the Honorable William M. Taylor, United States District Court Judge, under the style *In Re Beef Industry Antitrust Litigation*, M.D.L. No. 248 (N.D. Tex.). A. L. Black is a plaintiff in *A. L. Black, et al.* v. *Albertson's, Inc.*, CA2-75-186 (N.D. Tex. filed December 30, 1975) alleging violations of the antitrust laws by various retail food chains. Darrell Cameron is a plaintiff in *Darrell Cameron, et al.* v. *Iowa Beef Processors, Inc.*, 77-192-2 (S.D. Iowa filed July 1, 1977) alleging violations of the antitrust laws by various cattle packers and slaughterers. By order of the district court, dated December 11, 1980, discovery on the merits was ordered to proceed in all cases after an absence of five years of any meaningful discovery.

Both A. L. Black and Darrell Cameron do not have a direct interest in the outcome of this appeal; rather, their interest in M.D.L. No. 248 may be directly affected by this appeal's outcome.[3]

In addition, A. L. Black and Darrell Cameron respectfully submit this brief as *amici curiae* to the Court to express their interests in the contribution issue from

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[3] M.D.L. No. 248's retail food chain case involves thirteen private antitrust actions which, if a right to contribution is promulgated by this Court, will further complicate a complex proceeding by way of multiple filings of cross-claims and third-party complaints. The result will be a lengthy determination of the rights of the parties as to the contribution issue and a further postponement of the determination of and cessation of continuing antitrust violations.

the perspective of antitrust plaintiffs desirous of opposing any possible deterioration of existing antitrust laws and its deterrent effects through a misplaced assertion of a right to contribution.

SUMMARY OF ARGUMENT

The diverse arguments presented on this appeal realistically can be condensed to a single question: Is a rule which results in a relieving of the punitive effect of treble damages to be given supremacy over the Congressional policy holding *in initio* that violators of the antitrust laws are held jointly and severally liable without a right to contribution which would result in mitigating its deterrent effect? *Amici curiae* A. L. Black and Darrell Cameron respectfully submit that it is contrary to the national economic interest to forfeit valuable deterrent effects, would inhibit the imposition of a deterrence factor, stymie settlement negotiations, and frustrate the role of private attorneys-general. Furthermore, a determination by this Court of a right to either contribution or claim reduction would needlessly affix to this Court and its inferior courts the added responsibility of deliberating the scope of rights to contribution. As this brief will demonstrate, "allowance of third-party claims may open a Pandora's box of procedural problems, against which district court discretion may prove a palliation." *Wilson*

M.D.L. No. 248's slaughterer and packer case currently has a petition for writ of certiorari pending before this Court addressing the issue of contribution in antitrust cases. Petition for Writ of Certiorari, *Iowa Beef Processors, Inc., et al.* v. *Meat Price Investigators Ass'n, Darrell Cameron and Don Ludvigson, et al.*, No. 79-1214 (filed Feb. 6, 1980). The determination of the case presently before the Court will be dispositive of the issue presented in Petition No. 79-1214.

P. Abraham Construction Corp. v. *Texas Industries, Inc.*, 604 F.2d 897, 906 (5th Cir. 1979).

The preservation of the status quo by denial of the right to contribution becomes apparent when the desires of convicted antitrust violators are balanced against the needs of a viable and efficient free market system and the intended goals of Congress in passing antitrust legislation.

ARGUMENT

I. Contribution Eliminates The Deterrence Factor Created By Congress

A. The Threat of Sole Liability for Treble Damages Is the Most Effective Deterrent

In *Wilson P. Abraham Construction Corp.* v. *Texas Industries, Inc.*, 604 F.2d 897 (5th Cir. 1979), the Fifth Circuit recognized that elimination of the bar to contribution and claim reduction also eliminates Congress' deterrent intent of joint and several liability.

> We conclude, consistent with *prevailing economic theory*, however, that the very possibility of imposition of sole liability has an enhanced deterrent effect.

604 F.2d at 90 (footnote omitted, emphasis added). The court found support for so holding based in the economic belief that management personnel of potential antitrust violators are generally "risk-averse" in that the potential violators are "deterred more by the slight prospect of a large loss than by the strong prospect of a small loss." 604 F.2d at 901 n. 8.

This same "prevailing economic theory"[4] has been the basis for denial of a right to contribution and other means of claim reduction in federal courts. *See Olson Farms, Inc.* v. *Safeway Stores, Inc.*, 1979-2 Trade Cases (CCH) ¶ 62,995, 79,702 (10th Cir. 1979); *Goldlawr, Inc.* v. *Shubert*, 276 F.2d 614 (3d Cir. 1960); *El Camino Gas* v. *Sunglo Glass Co.*, 1977-1 Trade Cases (CCH) ¶ 61,533 (N.D. Cal. 1976); *Sabre Shipping Corp.* v. *American President Lines, Ltd.*, 298 F.Supp. 1339 (S.D.N.Y. 1969). *See also*, Judge Hanson's dissent in *Professional Beauty Supply* v. *National Beauty Supply*, 594 F.2d 1179, 1189 (8th Cir. 1979).

The certainty that defendant's jury-assessed damages will be mitigated by contribution[5] from numerous other parties creates an atmosphere fostering a desire to "run the risk" of liability to benefit from ill-gotten gains in the short-run and market share increases in the long-

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[4] Economic theory and empirical evidence supporting the hypothesis of "risk-aversity" is summarized in K. ELIZINGA & W. BREIT, THE ANTITRUST REMEDIES 126-129 (1976). *See* AUSTIN, *Negative Effects of Treble Damages Actions: Reflections on the New Antitrust Strategy*, 1978 DUKE L. J. 1353, 1357-66; *In Pari Delicto and the Deterrence of Antitrust Violations*, 62 MINN. L. REV. 59, 77-78 (1977); Note, *Contribution in Private Antitrust Suits*, 63 CORNELL L. REV. 682-702 (1978).

[5] As the Fifth Circuit realized below:

> [A] rule prohibiting contribution among antitrust coconspirators not only does not frustrate deterrence *but may well enhance the statute's deterrent effect by preventing a defendant from cutting its losses.*

Wilson P. Abraham Construction Corp. v. *Texas Industries, Inc.*, 604 F.2d 897, 903 (5th Cir. 1979) (emphasis added, footnote omitted).

run.[6] Parties to the illegal agreement will "run the risk" of culpability knowing that treble damages can be shifted to other parties, some of whom may be destined for insolvency, yet secure in knowing that their illegal gains in the short run and increased market share in the future will ensure the "profitability" of collusion.[7] Contribution can therefore become a tool, the secondary effect of which may be the lessening of competition by elimina-

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[6] Again, as stated by the court below:

> We believe it reasonable to assume, however, that even businesses of the purest motives necessarily steer wide of any conduct the effects of which may violate the law, in the knowledge that full, trebled damages possibly await even an unintentional transgression. Allowing contribution may diminish this prophylactic, chilling effect by reducing the threatening specter of sole liability. Businesses may be encouraged to risk anticompetitive conduct secure in the knowledge that proof of illegal purpose is often impossible and that liability for illegal effects will be dissipated.

Wilson P. Abraham Construction Corp. v. *Texas Industries Inc.* 604 F.2d 897, 905 (5th Cir. 1979). With a right to contribution readily exercisable by members of the market, it may well be that potential competition waiting in the wings will "steer clear" of a market so concentrated that there is a potentiality for collusion. The threat of culpability for unintentional violations may necessitate a business decision to forestall or terminate the decision to enter the market. Due to the potential for liability through contribution, business previously on the fringe waiting to enter the market will reconsider its plans, resulting in a lessening of potential competition.

[7] A result of a contribution rule will be the unintended consequence that firms with smaller profit margins (regardless of their market share) will face insolvency. The marked concentration of the market that will surface will mean a lessening of competition, increased market share for wrongdoers able to weather the storm and a further likelihood that future collusion in a very concentrated market will go undetected with greater longevity. See discussion below.

tion of competitors through the insolvency of smaller participants coerced into following the "leader."

B. Contribution Will Be an Effective Means of Assuring Adherence to the Terms of the Illegal Contract, Combination or Conspiracy

Allowance of a right to contribution will eradicate all deterrent goals where the contract, combination or conspiracy hinge on complete cooperation of the parties. It is beneficial to the illegal contract, combination or conspiracy to maintain those subversive activities for as long as profitable. As stated by Professor Posner:

> Once the agreement is in force, the parties must have effective means of assuring adherence to it. . . . [A seller] might cheat because he lacked confidence that the cartel would endure and saw no advantage in forgoing short term gains for long term gains unlikely to be realized. . . . To control cheating effectively, parties to price-fixing agreements may have to create elaborate machinery for the prevention, detection, and punishment of cheaters — joint sales agencies, systems for reporting trans action prices, penalties for cheating and so forth.

POSNER, ANTITRUST — CASES, ECONOMIC NOTES AND OTHER MATERIALS, 121-122 (1974). Stated another way:

> Regardless of how the price is set or the output restricted there will usually be a strong temptation for individual participants to cheat. An individual firm will typically be aware that if it could successfully reduce its price while all other firms maintained the agreed-upon price, it would be able to substantially expand its sales and profits. . . . [B]ut the ideal situation for each individual firm would be for all other firms to collude on price, while it alone

> competes. Individual firms will be aware of this and to the extent that they do cheat (or attempt to do so), there will be a tendency for the cartel to break down.

SULLIVAN, ANTITRUST §61,163 (1977).

Therefore, to effectuate an efficient oligopoly market or price-fixing arrangement, all members of the contract, combination or conspiracy must cooperate by strict adherence to the agreement. Removal of factors which mitigate against cheating or other breakdowns of the conspiracy prolong their collusive existence and provide a purpose for adherence to agreement terms. The more numerous the participants to the illegal arrangement, the more difficult it is to facilitate the venture. However, if the members privy to the antitrust violation will be liable for contribution, it will become beneficial to maintain the secrecy of their covert activities.

That is to say, the threat of contribution will mitigate against cheating in favor of prolonged coversive arrangements. Potential liability for contribution prevents the incentive to cheat, for cheating on the arrangement will only bring to light the illegal activity, thereby bringing it to premature exposure or finality. Removal of the incentive to cheat by holding a party to the agreement liable for contribution has the adhesive effect of compliance to terms of the illegal arrangement. In essence, what is boasted by some violators to be the most beneficial deterrence factor — purportedly aiding in adherence to antitrust laws — is in fact an instrument to facilitate the covert illegal operation.

II. Contribution Would Inhibit Settlement Negotiation

A. This Court Promotes Settlement of Complex Antitrust Litigation

Courts have frequently reiterated the importance of settlement in litigation. For example, in *Cotton* v. *Hinton*, 559 F.2d 1326 (5th Cir. 1977), this Court recognized:

> [L]itigants should be encouraged to determine their respective rights between themselves. . . . Particularly in class actions, there is an overriding public interest in favor of settlement.

559 F.2d at 1331.[8] This Court has recognized that promoting even partial settlements is consistent with the aims and purposes of the antitrust laws. *Zenith Radio Corp.* v. *Hazeltin Research, Inc.*, 401 U.S. 321, 346-47 (1971), *reh. denied*, 401 U.S. 1015 (1971).

The policy of encouraging settlement would clearly be impeded were this Court to accept contribution in antitrust litigation. As recognized in *Sabre Shipping Corp.* v. *American President Lines, Ltd.*, 298 F.Supp. 1339 (S.D.N.Y. 1969), contribution

> would operate to prevent [a plaintiff from] receiving prompt recovery since no defendant would settle with it if he was to find himself back in the suit as a third-party defendant.

298 F.Supp. at 1346.

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[8] *See also Van Bronkhurst* v. *Safeco Corp.*, 529 F.2d 943, 950 (9th Cir. 1976); *Weight Watchers of Philadelphia, Inc.* v. *Weight Watchers International, Inc.*, 455 F.2d 770, 773 (2d Cir. 1972); *Columbia Pictures Industries, Inc.* v. *Schneider*, 435 F.Supp. 742, 747 (S.D.N.Y. 1977), *aff'd*, 573 F.2d 1288 (2d Cir. 1978).

No antitrust court has been willing to accept contribution as appropriate against settling defendants. Even the majority opinion in *Professional Beauty Supply* v. *National Beauty Supply*, 594 F.2d 1179 (8th Cir. 1979), the only circuit court case allowing contribution and not involving a settling defendant, recognized that a rule favoring contribution will necessitate a bright line determination to protect the rights of settling defendants (citing authorities which would deny contribution against settling defendants). 594 F.2d at 1184.[9]

Though not precedent, the Manual for Complex Litigation does represent the accumulated knowledge of some of today's most respected and experienced judges and other lawyers. According to these authorities, "[the] potential discovery in [antitrust] cases may be extensive and expensive so that early settlement discussions may be in the best interests of all concerned." MANUAL FOR COMPLEX LITIGATION ¶ 1.21, 18 (1977). Such early discussions are rarely, if ever, the product of the efforts of all defendants.[10]

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[9] Even non-statutory cases support denial of contribution against settling defendants. *See, e.g. Leger* v. *Drilling Well Control, Inc.*, 592 F.2d 1246, 1250 (5th Cir. 1979); *Gomes* v. *Broadhurst*, 394 F.2d 456, 468 (3d Cir. 1968) ("voluntary settlements are to be encouraged and a rule permitting contribution . . . would not work to that end."); *Martello* v. *Hawley*, 300 F.2d 721, 724 (D.C. Cir. 1962).

[10] *Amicus curiae* Westvaco Corporation has made the argument that a no-contribution rule would force the settlement of cases on the basis of a pressurized "domino" effect, basically arguing that the stockpiling of settlements forces a party defendant to settle when in fact there is no need. Brief of Amicus Curiae Westvaco Corporation at 11, n. 19. However, in a recent Senate Judiciary report, George F. Kress, chairman of the board of Green Bay Packaging Co., Inc., testified before the Committee on the

To permit contribution against settling defendants could force defendants to litigate these cases as long as even one of the defendants wishes to take the risk of trial. Greater investments of time and money will accordingly be shouldered not only by the parties, but also by the court. Once these investments exceed the amount at which the parties could have settled the litigation, even prudent businessmen may well feel compelled to justify their investments by trying to obtain a judgment in their favor. Under such circumstances, both partial settlements and group settlements would prove impossible to obtain.

The result will be that settling defendants would be forced to shoulder burdens of litigation against their will

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Judiciary of the United States Senate on Senate Bill No. 1468, that his company's decision would not have been affected by the availability of contribution or of mandatory claim reduction. When pressed by Senator Baucus whether mandatory claim reduction would have solved his company's problem, Mr. Kress admitted that it would not, stating:

> [B]ecause my liability would still be $75 million to $80 million, so I would be faced with a decision. My creditors would be off my back. I wouldn't have to worry about them. But the family eggs would all be put out on what the jury might do. I am afraid if I were faced with that, I would still have to settle.

Senate Comm. on the Judiciary, Hearings on S.1468 Before the Subcomm. on Antitrust, Monopoly and Business Rights, The Antitrust Equal Enforcement Act of 1979, 96th Cong., 1st Sess. 45 (1979). The testimony of Mr. Kress and the conclusion of the Committee on the Judiciary demonstrate that settling defendants make the decision not by pressure, but rather due to the high risk imposed by convincing evidence of illegal activities and what effect that will have on the jury award prior to it being trebled. In terms expressed by the Committee, "settling defendants are hardly pushed to the wall by plaintiffs' demands." Senate Comm. on the Judiciary, Report on S.1468 by the Comm., the Antitrust Equal Enforcement Act of 1979, 96th Cong., 1st Sess. 36 (1979).

because of the threat of contribution. The Fifth Circuit argued strongly against permitting non-settling defendants to use the "backstop" of settling defendants' assets to support both their continuing litigation efforts and ensure against any potentially adverse judgment which exceeds the protection which the settlements already afford. In *Leger* v. *Drilling Well Control, Inc.*, 592 F.2d 1246 (5th Cir. 1979), defendants attempted to obtain more benefit from the settlement than the court felt was permitted under admiralty comparative computations. In rejecting their request, this court held:

> We refuse to adopt an approach which would reward a defendant for refusing to settle. If a party decides to try a case, it must be prepared to accept whatever benefits or burdens flow from the decision.

592 F.2d at 1251. Similar logic should be applied in affirming the Fifth Circuit's dismissal of the claims for a right to contribution in this case.

B. The No-Contribution Rule Encourages Swift and Inexpensive Determination of the Litigation

Settlements play a crucial role in complex litigation. In *Cotton* v. *Hinton*, 559 F.2d 1326 (5th Cir. 1977), the Fifth Circuit discussed the "overriding public interest" in favor of settlements:

> In these days of increasing congestion in the federal court system, settlements contribute greatly to the efficient utilization of our scarce judicial sources.

559 F.2d at 1331.[11] When parties are eliminated from the

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[11] *See also Williams* v. *First National Bank*, 216 U.S. 582, 595 (1910); *Miller* v. *Republic National Life Insurance Co.*, 559 F.2d

litigation at an early stage, there is a substantial savings to all parties involved, including the court, in litigation costs. *See Weight Watchers of Philadelphia, Inc.* v. *Weight Watchers International, Inc.*, 455 F.2d 770, 773 (2d Cir. 1972); *Flintkote Co.* v. *Lysford*, 246 F.2d 368, 398 (9th Cir.), *cert. denied*, 355 U.S. 835 (1957); MANUAL FOR COMPLEX LITIGATION ¶ 1.46, 62-63 (1977).[12]

Settlements play an important and practical role in the efficient prosecution of any complex multi-party antitrust litigation because, among other reasons, they facilitate the emergence of the truth about the conspiracy. Typically, settling defendants agree to cooperate with plaintiffs, to tell the honest and complete truth, and thus assist plaintiffs in reassembling the conspiracy. Absent such cooperation, discovery expenses would drastically increase and antitrust enforcement would be severely frustrated. Defendants would be likely to close their ranks as well as their mouths until the dozens or hundreds of claims and cross-claims have been litigated. The encouragement of settlements would provide a limitation on lengthy litigation through the narrowing of issues and elimination of extensive and useless discovery, implementing the use of evidence provided by "an insider" to the contract, combination or conspiracy. The

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426, 428 (5th Cir. 1977); *Florida Trailer Equipment Co.* v. *Deal*, 284 F.2d 567, 571 (5th Cir. 1960).

[12] Of the 1,307 private antitrust cases terminated in 1978, only eight percent reached trial. Five hundred thirty-seven were terminated with no court action, and three hundred ninety-five more were terminated before pretrial procedures began. SEE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, FEDERAL JUDICIAL WORKLOAD STATISTICS Table C-4 (1978). A reasonable assumption is that a large percentage of these terminations involved settlements between the parties.

exchange of a settlement reflecting an assessment of damages incurred in return for compelling evidence of the conspiracy involves a trade-off which would vanish under a right to contribution rule. *See In re Ampicillin Antitrust Litigation*, 82 F.R.D. 647, 648 (D.D.C. 1979).

Without the possibility of settlement, plaintiffs would be unlikely to obtain prompt recovery of their losses, *Sabre Shipping Corp.* v. *American President Lines, Ltd.*, 298 F.Supp. 1339, 1346 (S.D.N.Y. 1969). Additionally, litigation vested with great expenditures of time and money on the part of plaintiffs will result in reconsideration of whether antitrust violations should be prosecuted or whether the plaintiff and its attorneys would come to the point of financial frustration or ruin culminating in abandonment of legitimate complaints due to the inability to finance such a venture.

III. Contribution Gives Rise To Complexity And Unmanageability In Antitrust Litigation, Impeding The Goals Of Congress

A. A Right to Contribution Would Restrain Manageability, Fostering Abandonment of the Role of Private Attorneys-General

Manageability of antitrust class actions is critical both to securing the justy, speedy and inexpensive determination of every action, FED. R. CIV. P. 1, and to encouraging the commencement of actions by private attorneys-general. The right to contribution would destroy manageability by burdening the court with a multitude of actions and by taking control of the case out of the plaintiff's hands. The courts have frequently cited manageability as a compelling reason for the no-contribution rule. *El Camino Glass* v. *Sunglo Glass Co.*,

1977-1 Trade Cases (CCH) ¶ 61,533, 72,112 (N.D. Cal. 1976); *Sabre Shipping Corp.* v. *American President Lines, Ltd.*, 298 F.Supp. 1339, 1346 (S.D.N.Y. 1969).

Antitrust law policy dictates that private claimants be encouraged to bring lawsuits because, as this Court has underscored, such litigation is the "bulwark of antitrust enforcement," *Perma Life Mufflers, Inc.* v. *International Parts Co.*, 392 U.S. 134, 139 (1968).

> [T]he purposes of the antitrust laws are best served by ensuring that the private action will be an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws.

To this extent, this Court has fully endorsed the need to eliminate complexities which would discourage private enforcement of the antitrust laws.[13]

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[13] These considerations led the Supreme Court in *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977), to hold that indirect purchasers have no cause of action under Section 4 of the Clayton Act. Indirect purchasers have been denied a cause of action due to the "costs to the judicial system and the efficient enforcement of the antitrust laws" imposed by the "complexities and uncertainties" raised by their claims. 431 U.S. at 732 and 740-45. Similar to indirect purchasers' actions, allowing contribution in antitrust cases "would tranform treble-damages actions into massive multi-partied litigations" (431 U.S. at 740), a change which should not be permitted unless Congress feels the new cause of action is warranted (431 U.S. at 734 n. 14 and 746).

The Tenth Circuit appreciated the litigation problems associated with the issue of contribution by citing with approval the dissent of Judge Hanson in *Professional Beauty Supply Inc.* v. *National Beauty Supply, Inc.*, 594 F.2d 1179, 1190 (8th Cir. 1979):

> The potential for confusion, delay, and complexity inherent in permitting antitrust defendants to implead other alleged violators (who may distort the litigation because of their size, nature of involvement, or position in the marketplace) would deter private plaintiffs of relatively limited means from bringing or maintaining a meritorious suit. Although district courts have the power to superintend complex litigation, the

In view of the important role which private litigants play in antitrust law enforcement, it is imperative that new stumbling blocks such as contribution not be thrown in plaintiffs' path. The litigation of nationwide antitrust conspiracies is difficult enough for the court and plaintiffs to manage as it is. Judge Singleton has noted the "already notorious complexity and unmanageability of antitrust cases," *In re Corrugated Container Antitrust Litigation*, 84 F.R.D. 40, 41 (S.D. Tex. 1979), and the Fifth Circuit has observed that these suits are "most complex." *Cotton* v. *Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977). Elimination of the no-contribution rule would give rise to the proliferation of cross-claims and third-party actions. The burden of managing all these claims would be felt not only by the plaintiffs[14] but also by the court itself.[15]

> multiplication of issue and parties must, nevertheless, be dealt with. The chilling effect on the incentive to bring or pursue a lawsuit is unlikely to be diminished by the mere possibility of the favorable uses of district court discretion. See *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977),

Olson Farms Inc. v. Safeway Stores, Inc., 1979-2 Trade Cases (CCH) ¶ 62,995, 79,703 (10th Cir. 1979).

[14] As stated by a partner of a prominent antitrust defense firm, extensively involved in nationwide conspiracy antitrust cases, conceding that contribution is unworkable:

> To allow contribution among conspirators would, however, add new complications to the inextricable maze of antitrust litigation. . . .
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> * * *
>
> . . . To permit defendants to seek contribution from one another would, however, greatly complicate antitrust litigation which is already labyrinthine. Plaintiffs might lose control of their cases with defendants vouching in other members of the industry and filing cross-claims against one another.

IZARD & MILLER, *High Price-Fixing Rewards Require Abolition of Joint, Several Liability*, 1 NAT'L L. J. 22, 23 (Aug. 27, 1979).

[15] A right to contribution will leave the court to deal with numerous claims among defendants even after every defendant had

B. Contribution Gives Rise to Illusory "Fairness"

Many violators, finding themselves facing treble damage awards after having committed grievous antitrust violations, assert that it is "unfair" for them to face awards which a jury appraises to be the damages incurred by the plaintiff as a result of the actions of the defendant. This after-the-fact, defense-oriented attitude misses the point.[16] Defendants-violators' actions were the cause-in-fact of plaintiff's injuries. Acting in unison, defendants promulgated an illegal act which deprived the plaintiff of a free market price. After the damage has been incurred, these parties, which freely consented to the antitrust violation, now wish to tell this Court that

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made its forestalled peace with the plaintiffs and plaintiffs were no longer before the court, as well as the insurmountably complex variations in which contribution may be invoked by defendants.

[16] Congress' intention in passing antitrust legislation was not whether the antitrust laws would impose "fairness" upon the defendant, but was intended to deter antitrust violations, compensate victims and deprive violators of the fruits of their illegality. *See Pfizer* v. *Government of India*, 434 U.S. 308, 314 (1978). To implement the deterrence factor, Congress refused to concern itself with whether sole liability for damages incurred as a result of the conspiracy was "fair." Congress, in passing antitrust laws, and the courts, in interpreting antitrust laws, have as their primary goal the economic interests "of the United States, upon whose trade and commerce the effects of the conspiracy are alleged to have fallen." *Sabre Shipping Corp.* v. *American President Lines, Ltd.*, 298 F.Supp. 1339, 1343 (S.D.N.Y. 1969). To suggest that this Court should seek to overrule the ninety-year-old deterrent effect intended by Congress in implementing the antitrust laws because it has the minor consequential effect of being "unfair" to a party which set in motion a devastatingly injurious conspiracy affecting the entire market of a product is unconscionable.

the jury's finding against them is "grossly unfair." However, a jury's finding of consent to an agreement to violate the antitrust laws finds that the parties incident to the agreement impliedly consented to joint and several liability and the possibility of being held solely accountable for the total damage of its actions. Post verdict, the parties seeking contribution now hope to abrogate the maxim of *volenti non fit injuria*. This Court's refusal to find a right to contribution will enhance the punitive effect of the antitrust laws by finding that wilful consent to perform an illegal contract, combination or conspiracy implies consent to the consequent sole liability for all damages incurred.

IV. This Court Should Defer To Congress The Decision Of The Appropriateness Of Creating A New Rule Permitting Contribution

This Court and lower federal courts have held that Congress is far better suited to consider the wisdom of a cause of action for contribution in no way suggested by existing legislation. In light of this well-established principle, this Court should determine that there is no right to contribution or claim reduction.

In *Halcyon Lines* v. *Haenn Ship Sealing & Refitting Corp.*, 342 U.S. 282 (1952), the Supreme Court held:

> In the absence of legislation courts exercising a common law jurisdiction have generally held that they cannot on their own initiative create an enforceable right of contribution as between joint tortfeasors.
>
> . . . .
>
> *We have concluded that it would be unwise to attempt to fashion new judicial rules of contribution*

> *and that the resolution of this problem should await Congressional action.*

342 U.S. at 285 (emphasis added).[17]

Indeed it appears that Congressional intent upon adoption of the Clayton Act in 1914 was not consistent with contribution. The report of the Committee on the Judiciary of the United States Senate on S. 1468 notes that the proposed bill would "supply the appropriate Congressional intent" which courts have perceived as lacking.

Many parties to this appeal have argued that to allow contribution would only be consistent with the growing national trend of contribution in other areas. However, antitrust courts have consistently held that Congress should determine whether or not to develop a new rule permitting contribution. In *Sabre Shipping Corp.* v. *American President Lines, Ltd.*, 298 F.Supp 1339 (S.D.N.Y. 1969), the party seeking contribution argued that securities cases supported its argument that

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[17] This Court also specifically deferred to Congress in another antitrust case when faced with the question of whether a policy argument was sufficient to preclude consumer causes of action under the provisions of Section 4 of the Clayton Act (15 U.S.C. §16 [1976]). *Reiter* v. *Sonotone Corp.*, _____ U.S. _____, 99 S.Ct. 2326 (1979). The Fifth Circuit below echoed the pronouncement of Reiter:

> Those aggrieved by this decision always have recourse to Congress, *a forum better suited to evaluation of the competing interests and policies involved.*

Wilson P. Abraham Construction Corp. v. *Texas Industries, Inc.*, 604 F.2d 897, 906 (5th Cir. 1979), *rehearing and rehearing en banc denied* (5th Cir. Nov. 29, 1979) (emphasis added). *See also In re Beef Industry Antitrust Litigation*, 1980-1 Trade Cases (CCH) ¶ 60,021, *en banc hearing denied* (5th Cir. Dec. 21, 1979).

the "no-contribution" rule should be changed in antitrust cases:

> Congress, aware of the rule against contribution saw fit to provide for it explicitly in the securities statutes but not in the enforcement of antitrust laws which dominate so much of our litigation, and . . . no such right should be implied.

298 F.Supp. at 1345.[18]

Any decision to permit contribution would involve substantial changes in antitrust policies. This Court has explicitly recognized in *Reiter* that such policy consideration should be addressed to Congress, not the courts. A more appropriate forum would be Congress who will be able to provide comprehensive consideration of the multiplicity of factors and consequences involved in contribution. In light of this and other pronouncements of this Court, this Court should refuse to grant contribution, or any other right to claim reduction, and rather defer to Congressional action.

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[18] *See also Olson Farms, Inc.* v. *Safeway Stores, Inc.*, 1979-2 Trade Cases (CCH) ¶ 62,995, *en banc rehearing granted* (10th Cir. Dec. 27, 1979). *Baughman* v. *Cooper-Jarrett, Inc.*, 391 F.Supp. 671, 678 n. 3 (W.D. Pa. 1975), *rev'd in part on other grounds*, 530 F.2d 529 (3d Cir. 1976), *cert. denied*, 429 U.S. 825 (1976). The conspicuous absence of any provisions relating to contribution in the antitrust statutes is indeed significant, for this Court has continually noted that:

> Obviously, then, when Congress wished to provide a private damage remedy, it knew how to do so and did so expressly. *Touche Ross & Co.* v. *Redington*, _____ U.S., at _____, 99 S.Ct., at 2487; *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S., at 734 95 S.Ct., at 1924; *See Amtrak*, 414 U.S., at 458, 94 S.Ct., at 693; *T.I.M.E., Inc.* v. *United States, supra*, 359 U.S., at 471, 79 S.Ct., at 908.

Transamerica Mortgage Advisors, Inc. v. *Lewis*, _____ U.S. _____, _____, 100 S.Ct. 242, 248 (1979).

CONCLUSION

For the foregoing reasons, as well as in the interests of assuring effective enforcement of the federal antitrust laws, ensuring even-handed administration of justice, and protecting the existence of a competitive and free market system, the *amici curiae* respectfully request that this Court follow the intent of the antitrust laws and deny the use of contribution and claim reduction by defendants in antitrust cases.

Respectfully submitted,

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No. 79-1144

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

TEXAS INDUSTRIES, INC.,
Petitioner,

VS.

RADCLIFFE MATERIALS, INC., et al.,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF AMICUS CURIAE BOISE CASCADE CORPORATION IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

	PAGE
Table of Authorities	ii
Interest of Amicus Curiae	1
Summary of Argument	2
Argument	5
I. The Propriety Of Contribution In Antitrust Cases Should Be Considered By Congress, Not The Courts	6
A. The Creation Of Contribution Rights In Antitrust Cases Is Not Supported By This Court's Precedent	7
B. Congress Is The Best Forum For Reviewing The Propriety Of Contribution Under The Antitrust Laws	9
II. Contribution In Antitrust Cases Would Be Undesirable And Unnecessary	11
A. Contribution Would Have Substantial Adverse Effects On Antitrust Litigation	11
1. Contribution Would Impose Unacceptable Burdens On Antitrust Courts And Litigants	12
2. Contribution Would Not Promote Deterrence	16
B. Contribution Would Not Promote Fairness In This And Other Antitrust Cases	17
C. Appropriate Remedies Are Available To Ameliorate Coercion In Antitrust Cases	20
III. Any Rule Of Contribution Must Exclude Settling Defendants	24
Conclusion	26

TABLE OF CASES AND AUTHORITIES

1. Cases

	PAGE
Alabama v. Blue Bird Body Co., No. 75-23-N (M.D. Ala. June 22, 1979), appeal docketed, No. 79-2667 (5th Cir. July 26, 1979)	5, 6, 17, 24
Alsup v. Montgomery Ward & Co., 57 F.R.D. 89 (N.D. Cal. 1972)	23
Alyeska Pipeline Service Co. v. The Wilderness Society, 421 U.S. 240 (1975)	8
In re Ampicillin Antitrust Litigation, 82 F.R.D. 647 (D.D.C. 1979)	6, 25
Arth Main Street Drugs v. Beer Distributors of Indiana, Inc., 26 F.R. Serv. 2d 87 (N.D. Ind. 1978)	23
In re Beef Industry Antitrust Litigation, M.D.L. No. 248 (N.D. Tex. Sept. 1, 1978), aff'd, 607 F.2d 167 (5th Cir. 1979), en banc rehng. denied (5th Cir. Dec. 21, 1979), pet. for cert. pending sub nom. Iowa Beef Processors, Inc. v. Meat Price Investigators Ass'n, No. 79-1214 (filed Feb. 6, 1980)	5
City of Atlanta v. Chattanooga Foundry & Pipe Works, 127 F. 23 (6th Cir. 1903), aff'd, 203 U.S. 390 (1906)	20
Commercial Casualty Ins. Co. v. Leonard, 196 S.W.2d 919 (Ark. 1946)	25
Cooper Stevedoring Co. v. Fritz Kopke, Inc., 417 U.S. 106 (1974)	18
In re Corrugated Container Antitrust Litigation, 84 F.R.D. 40 (S.D. Tex. 1979), aff'd per curiam, 606 F.2d 319 (5th Cir. 1979), cert. dismissed, 101 S. Ct. 311 (1980)	5, 12, 13, 2
Diamond v. Chakrabarty, 100 S.Ct. 2204 (1980)	11
Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256 (1979)	21

PAGE

El Camino Glass v. Sunglo Glass Co., 1977-1 Trade Cas. ¶ 61,533 (N.D. Cal. 1976) 6, 14, 17

In re Fine Paper Antitrust Litigation, M.D.L. No. 323 (E.D. Pa. Aug. 3, 1979) 5, 6, 23, 24

Fraley v. Worthington, 64 F.R.D. 726 (D. Wyo. 1974) 25

Getter v. R. G. Dickinson & Co., 366 F.Supp. 559 (S.D. Iowa 1973) 13

Glus v. G. C. Murphy Co., 629 F.2d 248 (3d Cir. 1980) 9

Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp., 342 U.S. 282 (1952) 8

Heizer Corp. v. Ross, 601 F.2d 330 (7th Cir 1979) 18

Hedges Enterprises v. Continental Group, Inc., 1979-1 Trade Cas. ¶ 62,717 (E.D. Pa. 1979) 5, 24

Hooley v. Red Carpet Corp. of America, 1975-1 Trade Cas. ¶ 60,285 (D. Ore. 1975), app. dismissed, 549 F.2d 643 (9th Cir. 1977) 23

Illinois v. City of Milwaukee, 406 U.S. 91 (1972) 17

Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977) 15

Judson v. Peoples Bank & Trust Co. of Westfield, 110 A.2d 24 (N.J. 1954) 19

Kline v. Coldwell, Banker & Co., 508 F.2d 226 (9th Cir. 1974), cert. denied, 421 U.S. 963 (1975) 23

Kohr v. Allegheny Airlines, Inc., 504 F.2d 400 (7th Cir. 1974), cert. denied, 421 U.S. 978 (1975) 18

Labbee v. Wm. Wrigley & Co., No. 4019 (W.D. Wash. Dec. 20, 1974) 6

Leger v. Drilling Well Control, Inc., 592 F.2d 1246 (5th Cir. 1979) 22

Little Rock School District v. Borden, Inc., 1980-1 Trade Cas. ¶ 63,059 (E.D. Ark. 1979) 25

	PAGE
Massey v. Sullivan Co., 464 S.W.2d 548 (Tenn. 1971) ..	25
Midwest Paper Products Co. v. Continental Group, Inc., 596 F.2d 573 (3rd Cir. 1979)	20
National Railroad Passenger Corp. v. National Association of Railroad Passengers, 414 U.S. 453 (1974)	8
National Society of Professional Engineers v. United States, 435 U.S. 679 (1978)	8
Newark Motor Inn Corp. v. Fleck, 1980-2 Trade Cas. ¶63,465 (D.N.J. 1980)	5, 14, 15, 17
Norfolk So. R. Co. v. Beskin, 125 S.E. 678 (Va. 1924) ..	25
Northwest Airlines, Inc. v. Transport Workers Union of America, AFL-CIO, 606 F.2d 1350 (D.C. Cir. 1979), cert. granted, 445 U.S. 902 (1980)	9
Olson Farms, Inc. v. Safeway Stores, Inc., 1977-2 Trade Cas. ¶61,698 (D. Utah), aff'd, 1979-2 Trade Cas. ¶62,995 (10th Cir. 1979), en banc rehng. granted (10th Cir. Dec. 27, 1979)	5, 8, 9
Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1968)	8
Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., No. 4-77-110 (D. Minn. Jan. 26, 1978), rev'd in part, 594 F.2d 1179 (8th Cir. 1979), en banc rehng. denied (8th Cir. April 17, 1979)	5, 6, 9, 10, 13, 16, 17
Reiter v. Sonotone Corp., 442 U.S. 330 (1979)	22
Rowe v. John C. Motter Printing Press Co., 273 F.Supp. 363 (D.R.I. 1967)	15
Sabre Shipping Corp. v. American President Lines, Ltd., 298 F.Supp. 1339 (S.D.N.Y. 1969)	6, 14
Textile Workers Union of America v. Lincoln Mills of Alabama, 353 U.S. 448 (1957)	7

PAGE

Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 (1979) 8

Troutman v. Modlin, 353 F.2d 382 (8th Cir. 1965) 15

United States v. Associated Press, 52 F.Supp. 362 (S.D.N.Y. 1943), aff'd, 326 U.S. 1 (1945) 8

United States v. Gilman, 347 U.S. 507 (1954) 8, 10

United States v. Reliable Transfer Co., 421 U.S. 397 (1975) 18

United States v. Standard Oil Co., 316 F.2d 884 (7th Cir. 1963) 19

United States v. Topco Associates, Inc., 405 U.S. 596 (1972) 8, 11

United States Fidelity & Guaranty Co. v. Park City Corp., 397 F.Supp. 411 (D. Ore. 1973) 25

Walker v. Patterson, 325 F.Supp. 1024 (D. Del. 1974) 15

Weinberg v. Mitchell, 588 F.2d 275 (9th Cir. 1978) ... 25

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Wilson P. Abraham Construction Corp. v. Texas Industries, Inc., No. 70-2820 (E.D. La. 1977), aff'd, 604 F.2d 897 (5th Cir. 1979), en banc rehng. denied, 608 F.2d 524 (5th Cir. 1979), cert. granted sub nom. Texas Industries, Inc. v. Radcliffe Materials, Inc., 101 S. Ct. 31 (No. 79-1144; 1980) 5, 8, 14, 17

Younger v. Glamorgau Pipe & Foundry Co., 418 F.Supp. 743 (W.D. Va. 1976), vacated on other grounds, 561 F.2d 563 (4th Cir. 1977) 9

Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321 (1971) 7, 22

2. Statutes and Rules

Antitrust Procedural Improvements Act of 1980, S. 390, 96th Cong., 2d Sess. (1980) 12

PAGE

Clayton Act, § 4, 15 U.S.C. § 15 20

Federal Rule of Civil Procedure 23 22

Sherman Act, 15 U.S.C. § 1 18

1955 Uniform Contribution Among Joint Tortfeasors Act, § 3, 12 U.L.A. 88 (1975) 14

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Manual for Complex Litigation, § 1.93 (1977) 14

Resolutions and Report of the Section of Antitrust Law of the American Bar Association on Proposed Amendment of the Clayton Act to Permit Contribution in Damage Actions Brought Thereunder (Sept. 6, 1979) 10

Restatement (2d) Torts § 886A(3) (1977) 19

S. Rep. No. 428 (S. 1468), 96th Cong., 1st Sess. (1979) 5, 10

No. 79-1144

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

TEXAS INDUSTRIES, INC.,

Petitioner,

VS.

RADCLIFFE MATERIALS, INC., et al.,

Respondents.

BRIEF OF AMICUS CURIAE BOISE CASCADE CORPORATION IN SUPPORT OF RESPONDENTS

Boise Cascade Corporation ("Boise") submits this brief pursuant to Supreme Court Rule 36.2 as *amicus curiae* in support of respondents. Boise respectfully submits that the decision of the United States Court of Appeals for the Fifth Circuit to deny contribution in antitrust cases should be affirmed.

INTEREST OF AMICUS CURIAE

Boise is one of thirty-eight defendants named in most of the more than sixty antitrust cases consolidated as *In re Corrugated Container Antitrust Litigation* ("MDL-310") in the United States District Court for the Southern District of Texas, Houston Division. The facts concerning this litigation are set forth in the Brief Of Amicus Curiae

Owens-Illinois, Inc. And Certain Other Defendants In The Corrugated Container Litigation, dated January 16, 1981. Boise, like the other MDL-310 *amici,* has a substantial interest in this litigation because of the probability that The Mead Corporation and other defendants in MDL-310 will continue to assert contribution claims against Boise and their other co-defendants unless this Court rejects contribution claims in antitrust cases. Boise was accepted as an *amicus curiae* on respondents' side in the Fifth Circuit and has obtained the parties' written approval for the filing of this brief in accordance with Rule 36.2.

SUMMARY OF ARGUMENT

I.

Despite the rejection of contribution claims in at least seventeen federal appellate and district court antitrust cases since 1969, petitioner requests this Court to create a new cause of action for contribution in all antitrust cases. However, contribution is not supported by either the statutory language or legislative history of the antitrust laws. Moreover, contribution would have complex social, economic and competitive effects. Review of contribution by this Court in light of these factors would be contrary to substantial precedent, and is unsupported by this Court's common law cases. This Court should therefore defer to Congress on the question of whether contribution should be created for antitrust cases.

II.

Even if this Court finds it should not defer to Congress, the Fifth Circuit's ruling against petitioner's claims should be affirmed because contribution is undesirable and unnecessary in antitrust cases.

Contribution would have serious adverse effects on antitrust litigation and the judiciary. It would often substantially complicate or change antitrust cases through, among others, the addition of parties by defendants, the probability of multiple trials regarding the same controversy and the deterioration of joint defense coordination. These problems would impose unacceptable burdens on antitrust courts and litigants.

Fairness would not be served by permitting contribution in this and other antitrust cases. The complexities injected into antitrust suits and the potential addition of innocent parties would not be fair to either plaintiffs or defendants. Moreover, fairness considerations in antitrust cases necessarily differ from those in the negligent tort actions in which contribution has typically been permitted.

The concerns expressed by petitioner and *amici* regarding coercion resulting from judicially created joint and several liability in antitrust litigation can and are being handled through more effective utilization of existing procedural devices, such as refusal to certify coercive class actions under Rule 23. The courts also can diminish or eliminate the coercive impact of joint and several liability through other means, including claim reduction or the actual abolishment of joint and several liability in some or all cases. Courts should remain free to exercise their power to adopt these remedies since they would not have the panoply of adverse effects which a new cause of action for contribution would have on antitrust courts and litigants.

For each of these reasons, a new cause of action for contribution should not be created for antitrust cases.

III.

Permitting contribution claims against settling defendants in antitrust cases would frustrate the strong judicial

policy favoring settlement. If contribution were allowed against them, settling defendants would be forced to shoulder once again the same litigation expenses and exposure which they faced in the settled cases. No defendant would settle under such circumstances. For this reason, even those courts and statutes which have recently created contribution rights have explicitly precluded contribution claims against settling defendants. If a new cause of action for contribution were established for antitrust cases, no such claims should be permitted against settling defendants.

ARGUMENT

The text and legislative history of the antitrust laws provide no support for petitioner's contribution claims. Since the Sherman Antitrust Act was passed in 1890, Congress has repeatedly passed new antitrust laws, or amended the existing antitrust statutes, without mentioning contribution. The first consideration of contribution under the antitrust laws by any Congressional body occurred in July 1979. At that time a bill permitting contribution in price-fixing cases was approved by the Senate Judiciary Committee. S.Rep. No. 428 (S. 1468), 96th Cong., 1st Sess. (1979). There has been no action on the bill since it was reported out to the Senate.

At least seventeen courts have denied contribution claims in antitrust cases since 1969.[1] In 1979 a divided Eighth

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[1] Olson Farms, Inc. v. Safeway Stores, Inc., 1977-2 Trade Cas. ¶ 61,698 (D. Utah), aff'd, 1979-2 Trade Cas. ¶ 62,995, en banc rehng. granted (10th Cir., Dec. 27, 1979); In re Beef Industry Antitrust Litigation, M.D.L. No. 248 (N.D. Tex. Sept. 1, 1978), aff'd, 1980-1 Trade Cas. ¶ 63,021, en banc rehng. denied (5th Cir. Dec. 21, 1979), pet. for cert. pending sub nom. Iowa Beef Processors, Inc. v. Meat Price Investigators Ass'n, No. 79-1214 (filed Feb. 6, 1980); In re Corrugated Container Antitrust Litigation, 84 F.R.D. 40 (S.D. Tex. 1979), aff'd per curiam, No. 79-2439 (5th Cir. 1979), cert. dismissed, 101 S.Ct. 311 (No. 79-972; 1980); Wilson P. Abraham Construction Corp. v. Texas Industries, Inc., No. 75-2820 (E.D. La. 1977), aff'd, 604 F.2d 897, en banc rehng. denied, 608 F.2d 524 (5th Cir. 1979), cert. granted sub nom. Texas Industries, Inc. v. Radcliffe Materials, Inc., 101 S.Ct. 351 (No. 79-1144; 1980); Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., Civil No. 4-77-110 (D. Minn. Jan. 26, 1978), rev'd in part, 594 F.2d 1179 (8th Cir. 1979), en banc rehng. denied (8th Cir. April 17, 1979); Newark Motor Inn Corp. v. Fleck, 1980-2 Trade Cas. ¶ 63,465 (D. N.J. 1980); In re Fine Paper Antitrust Litigation, M.D.L. No. 323 (E.D. Pa. Aug. 3, 1979); Alabama v. Blue Bird Body Co., No. 75-23-N (M.D. Ala. June 22, 1979), appeal docketed, No. 79-2667 (5th Cir. July 26, 1979); Hedges Enter-

Circuit panel became the first and only court to hold that "the right of contribution [should] exist [in antitrust cases] . . . at least under certain circumstances." *Professional Beauty Supply, Inc.* v. *National Beauty Supply, Inc.*, 594 F.2d 1179, 1185 (8th Cir. 1979) ("*Beauty Supply*"). Since the Eighth Circuit's decision, two appellate and at least five district courts have rejected even *Beauty Supply's* limited holding. *See* note 1, *supra*.[2]

Contribution claims are therefore unsupported by the text and legislative history of the antitrust laws and by the overwhelming weight of federal antitrust precedent.

I. THE PROPRIETY OF CONTRIBUTION IN ANTITRUST CASES SHOULD BE CONSIDERED BY CONGRESS, NOT THE COURTS

The threshhold question in this case is whether, in the absence of any congressional support, this Court should create a cause of action for contribution in statutory cases. Contrary to petitioner's position, this Court's cases demonstrate that deference to Congress on this issue is appropriate in all statutory cases, and particularly in those brought under the antitrust laws. Substantial policy considerations also fully justify deference to Congress on the contribution issue.

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prises v. Continental Group, Inc., 1979-1 Trade Cas. ¶ 62,717 (E.D. Pa. 1979); In re Ampicillin Antitrust Litigation, 82 F.R.D. 647 (D.D.C. 1979); El Camino Glass v. Sunglo Glass Co., 1977-1 Trade Cas. ¶ 61,533 (N.D. Cal. 1976); Labbee v. Wm. Wrigley & Co., No. 4019 (W.D. Wash. Dec. 20, 1974); Sabre Shipping Corp. v. American President Lines, Ltd., 298 F.Supp. 1339 (S.D.N.Y. 1969).

[2] *Beauty Supply* has been interpreted to permit claims only against nondefendants and expressly to exclude settling defendants. See Alabama v. Blue Bird Body Co., supra, at 3-5; In re Fine Paper Antitrust Litigation, supra, at 3; In re Ampicillin Antitrust Litigation, supra, at 650.

A. The Creation Of Contribution Rights In Antitrust Cases Is Not Supported By This Court's Precedent.

Petitioner relies upon three categories of cases to support its view that this Court should create a cause of action for contribution in antitrust cases. Far from supporting petitioner's claims, these cases demonstrate that a decision by this Court to create a cause of action for contribution would be unprecedented.

The first group of cases is exemplified by *Illinois* v. *City of Milwaukee,* 406 U.S. 91 (1972). Brief for Petitioner Texas Industries, Inc. ("Petitioner Br.") at 8. In that case this Court reaffirmed the existence of a nuisance action under federal common law. In contrast to the antitrust laws, no statute had aligned the rights of any of the litigants.

In the second group, the case creating federal common law deals with a statute which provides that federal jurisdiction exists over certain controversies involving specified parties, but does not establish the substantive law to be applied in such cases. *Textile Workers Union of America* v. *Lincoln Mills of Alabama,* 353 U.S. 448 (1957), cited by petitioner at p. 8 of its brief, is an example of a case dealing with such a statute. Unlike the labor statute considered in *Lincoln Mills,* the antitrust laws do not merely provide federal courts with a jurisdictional grant over cases between specified parties.

The last group of cases cited by petitioner includes those in which this Court necessarily must create procedures or delineate the scope of the substantive causes of action created by the antitrust laws in order for them to function. *Zenith Radio Corp.* v. *Hazeltine Research, Inc.,* 401 U.S. 321, 342-48 (1971), for example, involved the question of

the effect of a release on a plaintiff's claims against other alleged coconspirators. Petitioner Br. at 10. Other cases cited by petitioner deal with the scope of the causes of action created by Congress for antitrust plaintiffs, resolution of which is particularly necessary because the courts have the duty of fixing the standard for each violation. *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 688 (1978); *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134, 137-40 (1968); *United States* v. *Associated Press*, 52 F.Supp. 362, 370 (S.D. N.Y. 1943), *aff'd*, 326 U.S. 1 (1945).

These cases provide no support for judicially creating a cause of action for contribution in statutory cases. However, this Court's cases fully support deference to Congress on the issue of contribution in antitrust and other statutory cases. *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11 (1979); *Alyeska Pipeline Service Co.* v. *The Wilderness Society*, 421 U.S. 240, 271 (1975); *National Railroad Passenger Corp.* v. *National Association of Railroad Passengers*, 414 U.S. 453, 458 (1974); *United States* v. *Topco Associates, Inc.*, 405 U.S. 596, 611 (1972); *United States* v. *Gilman*, 347 U.S. 507 (1954); *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282, 285-86 (1952). The Fifth Circuit in this case and the Tenth Circuit have recognized that Congress is the more appropriate forum for the resolution of this issue. *Wilson P. Abraham Construction Corp.* v. *Texas Industries, Inc.*, 604 F.2d 897, 906, *en banc rehng. denied*, 608 F.2d 524 (5th Cir. 1979), *cert. granted sub nom. Texas Industries, Inc.* v. *Radcliffe Materials, Inc.*, 101 S.Ct. 351 (No. 79-1144; 1980) (*"Abraham Construction"*); *Olson Farms, Inc.* v. *Safeway Stores, Inc.*, 1979-2 Trade Cas. ¶ 62,995 at 79,704 (10th Cir. 1979), *en banc rehng. granted* (10th Cir. Dec. 27, 1979).

B. Congress Is The Best Forum For Reviewing The Propriety Of Contribution Under The Antitrust Laws.

There are substantial reasons for deferring to Congress on the issue of contribution in each statutory area.

In the absence of judicial deference, inconsistency in results would be almost a certainty in each statutory cause of action until this Court has resolved each substantive and procedural issue. Courts could differ in their opinions as to whether such claims should be created under each statute, as has happened in two of the three statutory areas in which this issue is presently under review in this Court.[3] The procedural and substantive parameters[4] of any cause of action created then would be subject to further debate and inconsistency. Resolution of the merits of contribution and its many differe[illegible]forms in each statutory area through

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[3] *Antitrust:* Compare Beauty Supply, supra, with the Fifth Circuit's opinion herein, and Olson Farms, supra. *Title VII:* Compare Younger v. Glamorgau Pipe & Foundry Co., 418 F.Supp. 743 (W.D. Va. 1976), vacated on other grounds, 561 F.2d 563 (4th Cir. 1977), with Glus v. G. C. Murphy, 629 F.2d 248 (3d Cir. 1980). *Northwest Airlines, Inc.* v. *Transport Workers Union of America, AFL-CIO,* 606 F.2d 1350 (D.C. Cir. 1979), *cert. granted,* 445 U.S. 902 (1980), is consistent with other cases which have uniformly rejected contribution claims under the Equal Pay Act.

[4] Questions relating to the scope of the cause of action, venue and limitations of actions are examples of the issues which would pose considerable and varying problems if contribution rights were judicially created for statutory cases. For example, a very short limitations period for contribution claims may be entirely appropriate in antitrust cases because the facts from which antitrust claims arise are more complex than those required to prove other types of actions, and the information and facts may therefore be more easily lost over time to the contribution action defendant's detriment.

judicial analysis of the facts and arguments in many separate cases would involve tremendous expenditures of time and effort by the courts, risk continual inconsistency in application and results, and impose constant uncertainty on litigants and courts. However, resolution of even foreseeable substantive and procedural issues through the facts and arguments of one case in each statutory area, without thorough investigation, examination and study of their impact on the important social, economic and competitive considerations involved in creating contribution claims in each factual context, would place courts in the position of creating a rule which could have unforeseen results in other cases. *See United States* v. *Gilman,* 347 U.S. 507, 510 (1954).

A broad and empirical study of the relative strengths and weaknesses of contribution and its many possible forms in each type of statutory case is possible only if review is undertaken in a Congressional setting. Such legislative balancing is particularly necessary insofar as the antitrust laws are concerned. The numerous effects which contribution would have on each type of antitrust case and factual setting could not be fully analyzed in the context of any single case. Antitrust courts, the parties in this case and other defendants, legislators and commentators have focused upon differing effects and considerations in analyzing the propriety of contribution. Moreover, in light of these considerations, contribution advocates in this case and elsewhere have supported different procedural and substantive forms of contribution.[5]

Unlike the courts, Congress could examine at one time these many views on the important economic and social

[5] See, e.g., S. Rep. No. 428 (S. 1468), 96th Cong., 1st Sess. (1979); Resolutions and Reports of the Section of Antitrust Law of the American Bar Association on Proposed Amendment of the Clayton Act to Permit Contribution In Damage Actions Brought Thereunder (Sept. 6, 1979); *Beauty Supply,* 594 F.2d at 1186.

policy considerations involved in each possible form of contribution in every antitrust context.[6] As this Court has recognized, decisions on issues which would affect competition and deterrence are more appropriately addressed by Congress than by the courts. *See United States* v. *Topco Associates, Inc.*, 405 U.S. 596, 611 (1972).

As the discussion above demonstrates, contribution should not be recognized in any antitrust case in the absence of a Congressional directive to do so.

II. CONTRIBUTION IN ANTITRUST CASES WOULD BE UNDESIRABLE AND UNNECESSARY

Contribution would have numerous adverse effects upon antitrust litigation. Moreover, contribution in antitrust litigation would be inequitable, is not supported by contribution precedent, and is not necessary to ameliorate or resolve petitioner's concerns. For each of these reasons, petitioner's contribution claims should be rejected.

A. Contribution Would Have Substantial Adverse Effects On Antitrust Litigation.

Both appellate and district courts have rejected contribution claims in antitrust cases because of their adverse effects

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[6] Such reasons for deference were recently reiterated in *Diamond* v. *Chakrabarty*, 100 S.Ct. 2204, 2212 (1980), where an interpretation of a statute was rejected with the observation that:

> The choice we are urged to make is a matter of high policy for resolution within the legislative process after the kind of investigation, examination, and study that legislative bodies can provide and courts cannot. That process involves the balancing of competing values and interests, which in our democratic system is the business of elected representatives. Whatever their validity, the contentions now pressed on us should be addressed to the political branches of the government, the Congress and the Executive, and not to the court.

on antitrust litigants and courts, including the frustration of settlements[7] and the other prohibitive burdens contribution would impose on the judicial administration of antitrust cases. In light of these problems, creation of contribution rights for petitioner would be wholly inappropriate.

1. Contribution Would Impose Unacceptable Burdens On Antitrust Courts And Litigants.

The present burden of antitrust cases on the judiciary is a matter of such broad concern that Congress has recently passed legislation for the express purpose, among others, of expediting antitrust litigation.[8] The legal profession has also expressed its concerns over the burdens imposed on both courts and litigants by large complex cases.[9] Contribution would subject the already overworked federal court system to unacceptable burdens, to the considerable detriment of all concerned and in direct contradiction to these concerns. These burdens, which would render antitrust cases "virtually impossible to manage",[10] are sufficient in themselves to reject petitioner's claims.

The burdens on the judiciary in simply determining the propriety of contribution for each type of antitrust violation, and formulating the procedural and substantive

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[7] See Brief of Amicus Curiae Owens-Illinois, Inc. And Certain Other Defendants In The Corrugated Container Litigation.

[8] Antitrust Procedural Improvements Act of 1980, S. 390, 96th Cong., 2d Sess. (1980).

[9] In 1978, for example, the Board of Governors of the American Bar Association approved the creation of the Action Commission to Reduce Court Costs and Delay, which recently made public its first progress report. Hufstedler & Nyelski, ABA Action Commission Challenges Litigation Cost and Delay, 66 A.B.A.J. 965 (1980).

[10] In re Corrugated Container Antitrust Litigation, supra, 84 F.R.D. at 41.

aspects of any contribution cause of action created, would be considerable. Thereafter, courts and litigants would be constantly burdened with "the processing of the many possible cross-claims and impleader actions" and the hinderance or elimination of "joint defense efforts with their savings in court, staff and attorney time." *In re Corrugated Container Antitrust Litigation, supra,* 84 F.R.D. at 41. There is also substantial "potential for confusion, delay and complexity inherent in permitting antitrust defendants a right to implead other alleged antitrust violators who may distort the litigation . . .." *Beauty Supply, supra,* 594 F.2d at 1190 (dissenting opinion).

The considerable burdens, complications and distortions caused by contribution claims can be easily ascertained from a review of their impact in a case such as MDL-310. Cross-claims would be filed by some or all defendants against all other defendants. The contribution complaints need not name the same defendants as those named in the MDL-310 complaints, nor would they necessarily make the same conspiracy allegations;[11] in fact, each contribution complaint could name as third-party defendants some or all of the more than one thousand present and former corporate competitors of the defendants.[12] Individuals could also be named, adding substantially to the number of cross-claims and third-party claims. The allegations and cross-defendants in, and substantive scope of, each defendant's cross-complaint could also differ.

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[11] Additional claims or allegations could be made over and beyond those in the MDL-310 complaints as long as the claims would reasonably fit within plaintiffs' complaint. See, e.g., Getter v. R. G. Dickinson & Co., 366 F.Supp. 559, 569 (S.D. Iowa 1973).

[12] Indeed, one contribution claimant in MDL-310 specifically reserved its right to do so. An additional complication present in MDL-310 is that many of these potential third party defendants are already members of the plaintiff class.

The manageability problems of the additional contribution pleadings, claims, discovery requests and parties in antitrust cases merely during pretrial proceedings could become overwhelming if contribution were permitted. As one district court has noted, these complications present the "potential for reordering the entire structure of antitrust litigation." *Newark Motor Inn Corp.* v. *Fleck*, 1980-2 Trade Cas. ¶ 63,465 at 76,457 (D.N.J. 1980). *See also Wilson P. Abraham Construction Corp.* v. *Texas Industries, Inc.*, 604 F.2d 897, 906 (5th Cir. 1979); *El Camino Glass* v. *Sunglo Glass Co.*, 1977-1 Trade Cas. ¶ 61,533 at 72,112 (N.D. Cal. 1976); *Sabre Shipping Corp.* v. *American President Lines, Ltd.*, 298 F.Supp. 1339, 1346 (S.D.N.Y. 1969). The uncertain scope of the litigation caused by differing contribution claims would add to the confused state of such litigation. Moreover, while coordination of defendants is a well-recognized necessity in complex litigation,[13] the existence of contribution claims would virtually eliminate coordinated joint defense efforts.

The absence of cooperation would prolong discovery and cause continuing problems at trial. Moreover, parties forced to trial by reason of contribution claims will also prolong the trial itself.[14]

Of course, contribution claims need not be asserted in or tried with a plaintiff's action. *See, e.g.*, 1955 Uniform Con-

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[13] Coordination of defendants is a policy strongly encouraged by the Manual for Complex Litigation and was imposed in MDL-310 by court order. See Manual at § 1.93.

[14] If the cross-complaint named only the original defendants in the MDL-310 complaints, the trial of the class action cases would have been extended by at least three years if each of the thirty-seven contribution defendants took no longer to present its defense than the four weeks taken by the one defendant which tried the case to a verdict.

tribution Among Joint Tortfeasor Act, § 3(a), 12 U.L.A. at 88 (1975). If the plaintiffs were successful at trial, courts therefore could be confronted with the possibility of one or more cases brought by contribution claimants involving substantial pretrial discovery and trials of similar or longer duration than those in the original action. *See Newark Motor Inn Corp.* v. *Fleck,* 1980-2 Trade Cas. ¶ 63,465 at 76,458 (D. N.J. 1980).

In *Illinois Brick Co.* v. *Illinois,* 431 U.S. 720 (1977), this Court held that indirect purchasers did not have a cause of action under § 4 of the Clayton Act in part because of complications in proof which would result from attempting to divide damages between direct and indirect purchasers. According to the Court, one reason indirect purchasers had to be denied a cause of action was because of "the costs to the judicial system and the efficient enforcement of the antitrust laws" imposed by the "complexities and uncertainties" raised by their claims. 431 U.S. at 732 and 740-45. Just as in indirect purchaser actions, permitting contribution in antitrust cases "would transform treble-damages actions into massive multiparty litigations" (431 U.S. at 740), a change which should not be permitted unless Congress decides that the new cause of action is warranted (431 U.S. at 734 n.14 and 746). The complications of contribution, just like those involved in indirect purchaser suits, would be likely substantially to decrease the filing of private antitrust lawsuits.[15] As this Court held in *Illinois Brick*:

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[15] Unlike the indirect purchaser burdens and complications of proof analyzed in *Illinois Brick,* the burdens on the plaintiff in any antitrust case could continue even after its case was over: if contribution claims were severed or brought after judgment, a plaintiff's presence often could be required during pretrial discovery and trial in order for the contribution plaintiff to prove the contribution defendant's liability to plaintiff on the underlying claims. Cf. Troutman v. Modlin, 353 F.2d 382, 386-87 (8th Cir. 1965); Walker v. Patterson, 325 F.Supp. 1024, 1026 (D. Del. 1971); Rowe

> The Court's concern in *Hanover Shoe* [was] to avoid weighing down treble-damages actions with the 'massive evidence and complicated theories,' 392 U.S. at 493. . . . We are no more inclined than we were in *Hanover Shoe* to ignore the burdens that such an attempt would impose on the effective enforcement of the antitrust laws. (431 U.S. at 741.)

As the above discussion illustrates, the costs and inefficiencies which would be imposed on the federal court system and litigants by contribution claims in antitrust cases would be overwhelming.

2. Contribution Would Not Promote Deterrence.

Petitioner argues and *Beauty Supply* found that greater deterrence of antitrust law violations would occur if a potential violator knew that it would be joined in antitrust cases through contribution claims if an antitrust suit were filed. Petitioner Br. at 17; *Beauty Supply,* 594 F.2d at 1185.[16]

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v. John C. Motter Printing Press Co., 273 F.Supp. 363, 365 (D.R.I. 1967). Contribution claimants would often need to develop substantial evidence and testimony from plaintiffs during discovery and trial of their contribution claims.

[16] An underlying factual assumption of petitioner's argument is that coconspirators which were not named in a plaintiff's complaint would be forced into antitrust cases as third-party defendants if contribution were allowed, thereby forcing disgorgement of "ill-gotten gains." Several factors undermine the validity of this assumption. First, there is no guarantee that defendants would not join innocent third-party defendants in their contribution complaints. Second, the addition of other parties does not mean that "ill-gotten gains" will be obtained even if an alleged coconspirator is joined. In the instant case, the respondents could have obtained no "ill-gotten gains" from plaintiff, even if the conspiracy were properly found to exist, because they made no sales to the plaintiff. Third, it is the rare exception that a plaintiff chooses to forego suit against a large number or all of the corporations which it feels participated in the conspiracy alleged in its complaint.

There is no empirical evidence or economic proof that the uncertain prospect of being excluded from a plaintiff's suit encourages anticompetitive behavior. While *Beauty Supply's* majority recognized the deterrence question cuts both ways, its ultimate conclusion that deterrence would be increased was made independent of any economic analysis. 594 F.2d at 1185. No other court has agreed with its conclusion. *See, e.g., Abraham Construction, supra,* 604 F.2d at 901; *Alabama* v. *Blue Bird Body Co., supra,* at 5; *El Camino Glass* v. *Sunglo Glass Co.,* 1977-1 Trade Cas. ¶ 61,533 at 72,112; *Newark Motor Inn Corp.* v. *Fleck, supra,* 1980-2 Trade Cas. ¶ 63,465 at 76,457. In fact, *Beauty Supply's* conclusion that contribution strengthens deterrence is inconsistent with the views of the authors of the only comprehensive economic analysis of contribution in antitrust cases. These economists and lawyers concluded that contribution is inadvisable from a cost-benefit analysis in part because the probability of inclusion in a suit through contribution would not increase deterrence. Easterbrook, Landes & Posner, *Contribution Among Antitrust Defendants: A Legal and Economic Analysis,* 23 J.L. & Econ. 331, 349-50 (1980).

Far from the purported effects discussed by petitioner, contribution's complications would discourage private antitrust suits, thereby reducing deterrent effect of the antitrust laws.

B. Contribution Would Not Promote Fairness In This And Other Antitrust Cases.

Beauty Supply stated that "the deciding factor in [its] decision [was] fairness between the parties." 594 F.2d at 1185. However, *Beauty Supply's* conclusion to permit contribution is not supported by such fairness considerations in this and other antitrust cases.

Fairness considerations between the parties are generally not the same in antitrust cases as they are in the types of common law litigation for which contribution has typically been created. In the ship and airplane cases cited by petitioner,[17] the potential parties are usually fewer and always known, the proof is much less substantial, and there is no strong equity against imposition of additional claims among the few tortfeasors in the case. However, contribution would inject substantial complications into antitrust litigation which would be exceedingly unfair to plaintiffs and defendants,[18] could result in the impleading of innocent parties, and would impose heavy burdens upon the courts and parties not experienced in such actions.

Where contribution has been created, it has been permitted typically only in common law tort cases alleging negligent conduct. Fairness considerations in such cases differ dramatically from those in a typical Sherman Act,

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[17] Cooper Stevedoring Co. v. Fritz Kopke, Inc., 417 U.S. 106 (1974); United States v. Reliable Transfer Co., 421 U.S. 397 (1975) Kohr v. Allegheny Airlines, Inc., 504 F.2d 400 (7th Cir. 1974), cert. denied, 421 U.S. 978 (1975). Petitioners have also cited a securities case in support of their contribution claims. Heizer Corp. v. Ross, 601 F.2d 330 (7th Cir. 1979). However, this case dealt with contribution under a statute which expressly permits contribution claims under its private right of action sections.

[18] The problems generated for joint defense activities could decrease defendants' overall effectiveness in opposing coercive but baseless claims, precisely the opposite effect sought by petitioner. Moreover, the added evidentiary complexities would frequently increase the expense of discovery and trial for all parties. These added expenses could even force innocent but smaller defendants to forego the litigation through settlement of plaintiff's claims, if settlement ended liability for contribution.

§ 1 case. In such conspiracy cases, the complaints allege intentional actions: there is "no such thing as an 'unwitting conspirator'." *United States* v. *Standard Oil Co.*, 316 F.2d 884, 890 (7th Cir. 1963). Not only do the social policy considerations in granting contribution to intentional tortfeasors call for its denial in the absence of a statutory directive,[19] most statutes and most of the cases cited by petitioner permit only unintentional tortfeasors to sue for contribution.[20] Petitioner's contribution claim is therefore not supported by any trend toward granting contribution in cases such as this at the state or federal level.

Finally, even the fairness considerations advanced by contribution claimants often do not exist from a factual standpoint. In this case, for example, only petitioner made sales to the plaintiff. Nonetheless, petitioner claims it would be fair to force respondents to share in a judgment which would cover any overcharges which it alone has obtained. Such a result would certainly not be equitable or fair.

For all of the above reasons, *Beauty Supply's* fairness considerations do not apply in this or other complex antitrust cases.

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[19] As Mr. Justice Brennan noted while serving on the New Jersey Supreme Court: "These judicially created common-law and equitable principles [against contribution among intentional tortfeasors] are, of course, vulnerable to extinction or modification at the hands of the Legislature, the ultimate arbiter of public policy." Judson v. Peoples Bank & Trust Co. of Westfield, 110 A.2d 24, 34 (N.J. 1954).

[20] See, e.g., Restatement (2d) Torts § 886A(3) (1977). Thirty-four of the forty-seven states' contribution statutes permit contribution only by negligent tortfeasors.

C. Appropriate Remedies Are Available To Ameliorate Coercion In Antitrust Cases.

Amelioration of the coercive nature of joint and several liability is the objective of petitioner and certain of the MDL-310 *amici*.[21] *See* Petitioner Br. at 12; Brief of Westvaco Corporation as Amicus Curiae ("Westvaco Br.") at 9-12; Brief of Georgia-Pacific Corporation and Packaging Corporation of America as Amici Curiae ("G-P Br.") at 6-14; Brief of Weyerhaeuser Company and Willamette Industries, Inc. as Amici Curiae ("Weyerhaeuser Br.") at 4-6. The discussion above emphasizes that contribution is a procedural and substantive nightmare which would be detrimental to all involved in antitrust litigation. However, appropriate remedies do exist to combat such coercion in antitrust cases.

If this Court is inclined to eliminate coercion caused by joint and several liability, it should do so by abolishing joint and several liability, not through contribution.[22] Nothing in § 4 of the Clayton Act suggests that joint and several liability in antitrust cases is appropriate. The courts which first determined that joint and several liability should apply simply adopted the concept from the common law, without consideration of the implications of the rule in an antitrust context. *See, e.g., City of Atlanta* v. *Chattanooga Foundry & Pipeworks,* 127 F. 23 (6th Cir. 1903), *aff'd,*

[21] Petitioner's contribution claim would effectively eliminate the impact of joint and several liability because all conspirators would be liable only for their contributive shares.

[22] Such an approach has been advocated by a former Chairman of the American Bar Association's Section of Antitrust Law. See Izard & Miller, "High Price-Fixing Awards Require Abolition of Joint, Several Liability," 1 Nat. L.J. at 22-23 (Aug. 27, 1979). Some courts are presently confronting similar issues. Cf. Mid-West Paper Products Co. v. The Continental Group, Inc., 596 F.2d 573, 583-87 (3d Cir. 1979).

203 U.S. 390 (1906). When the possible rationales for the rule are examined under modern-day circumstances, the need for joint and several liability diminishes substantially.[23]

Abolishing joint and several liability outright would not have the same adverse effects as contribution. While permitting contribution against settling defendants would usually make settlement of antitrust cases impossible, in the absence of joint and several liability defendants could freely negotiate their final peace. The absence of joint and several liability would also permit plaintiffs to retain control over their cases, being able to choose the defendants to be joined in their cases and the precise nature of their claims. The potential changes in the geographic and substantive scope of their claims, which contribution could inject into the plaintiff's case, would not occur if joint and several liability were abolished. Moreover, those not sued by plaintiffs would be spared unnecessary and unfair burdens and expense imposed by a defendant's contribution claims. And, unlike contribution, the abolishment of joint and several liability would not adversely affect joint defense efforts.

Courts certainly should be left free to provide for court-ordered diminution of the coercive impact of joint and several liability on a case-by-case basis. Claim reduction

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[23] One major reason for the genesis of joint and several liability could have been problems of service of process. Under present "long-arm" service of process statutes, such problems would rarely preclude a plaintiff from joining all of those entities it has reason to believe participated in an anticompetitive conspiracy. Occasional problems also may arise because of financial instability or bankruptcy and termination of business prior to the plaintiff filing its lawsuit. See Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256, 275 n.2 (1979) (Blackmun, J., dissenting). However, under such circumstances a plaintiff might be permitted to recover the full amount from those against whom judgments could be obtained.

has such an effect[24] and is presently an issue in the MDL-310 litigation and other cases now pending in the lower courts. As demonstrated in certain *amici* briefs, this rule has been recognized in a number of other statutory and common law contexts.

Another device available to courts is the proper exercise of discretion pursuant to Rule 23, Federal Rules of Civil Procedure. Much of the MDL-310 *amici's* argument goes to the coercive nature of antitrust class actions. Properly used, Rule 23 can prevent the harassment of defendants and the extortion of settlements based on coercive antitrust claims. This Court has explicitly endorsed the use of Rule 23 for these purposes. Just last Term in *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 345 (1979), this Court directed district courts to use their broad Rule 23 powers to prevent extortion and windfall settlements:

> District courts must be especially alert to identify frivolous claims brought to extort nuisance settlements; they have broad power and discretion vested in them by Fed. Rule Civ. Proc. 23 with respect to matters involving the certification and management of potentially cumbersome or frivolous class actions. . . . Recognition of the plain meaning of the statutory language "business or property" need not result in administrative chaos, class action harassment, or "windfall" settlements if the district courts exercise sound discretion and use the tools available.

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[24] The claim reduction defense discussed by several other *amici curiae* differs from and is not dependent upon contribution. Claim reduction exists in some form in all cases in which settlements have been reached with some but not all defendants in a case: a plaintiff's claim against the remaining defendants is always reduced in some amount by reason of settlements in order to prevent double recovery. See Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 348 (1971); Leger v. Drilling Well Control, Inc., 592 F.2d 1246, 1250 (5th Cir. 1979). On the other hand, contribution would be a new cause of action created for entities found liable for antitrust violations.

Consistent with *Reiter,* several appellate and district courts have concluded that where the use of the class action device would result in potential treble damage liability for each defendant far in excess of that attributable to the activities of each defendant alone, the maintenance of a class action suit is not superior to other available methods for the fair and efficient adjudication of the controversy, as required by Rule 23(b)(3).[25] By limiting class action certification or decertifying a class once coercive conditions become apparent, a trial court can control the problems of harassment and coercion about which petitioner and MDL-310 *amici* complain.

Other mechanisms also are available to trial courts to prevent coercion, even after a suit is given class action status. Under Rule 23(e), a court is required to give its approval to all dismissals and compromises of class actions; this mechanism for the protection of absent class members also is ideally suited as a means to prevent harassment of defendants and coercion of settlements. *In re Fine Paper Antitrust Litigation, MDL-323,* Slip. Op. at 3 (E.D. Pa. Aug. 3, 1979). With such a tool, the trial court can use its powers to supervise the fairness of the settlement process in ways it deems most appropriate.

Thus, procedural tools are available to prevent the coercion and harassment of defendants in antitrust cases. They can be used to remedy the coercion problems where they in fact exist, without causing the substantial and fundamental

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[25] Kline v. Coldwell, Banker & Co., 508 F.2d 226 (9th Cir. 1974), cert. denied, 421 U.S. 963 (1975); Arth Main Street Drugs v. Beer Distributors of Indiana, Inc., 26 F.R.Serv.2d 87 (N.D. Ind. 1978); Hooley v. Red Carpet Corp. of America, Inc., 1975-1 Trade Cas. ¶ 60,285 (D. Ore. 1975), app. dismissed, 549 F.2d 643 (9th Cir. 1977); cf. Alsup v. Montgomery Ward & Co., 57 F.R.D. 89 (N.D. Cal. 1972).

disruptions to the scheme of antitrust enforcement which a cause of action for contribution would create, and without disturbing the precedent which calls for deferring to Congress on contribution.[26]

III. ANY RULE OF CONTRIBUTION MUST EXCLUDE SETTLING DEFENDANTS

In light of the importance of settlement and the equities which favor defendants settling in good faith, judicial and statutory causes of action for contribution have specifically precluded the imposition of contribution claims against settling defendants. In antitrust cases, any decision granting contribution surely must do the same. *Beauty Supply* itself recognized the need for such a rule by stating that it "should be able to fashion a rule of contribution which will protect the rights of settling defendants," citing authorities which would deny contribution against settling defendants. 594 F.2d at 1184. Likewise, several district courts which have rejected contribution in antitrust cases have specifically concluded that contribution claims could not be imposed against settling defendants, even if allowed against nonsettling defendants and third parties. *In re Fine Paper Antitrust Litigation, M.D.L. No. 323,* Slip Op. at 3 (E.D. Pa. 1979); *Alabama* v. *Blue Bird Body Co.*, No. 75-23-N, Slip Op. at 4-5 (N.D. Ala. June 22, 1979), *appeal docketed,* No. 79-2667 (5th Cir. July 26, 1979); *Hedges Enterprises* v. *Continental Group, Inc.*, 1979-1 Trade Cas.

[26] Antitrust defendants can also protect themselves against potentially large joint and several liability by contractually allocating the risk of liability among themselves. Such contractual arrangements, known as sharing agreements, are becoming more common in large antitrust litigation. They typically bind the participating defendants to contribute proportionately to the payment of any judgment rendered against any of them, or to remove their market share from the litigation when settlement occurs.

¶ 62,717 at 77,993 (E.D. Pa. 1979); *In re Ampicillin Antitrust Litigation*, 82 F.R.D. 647, 650 (D.D.C. 1979); *Little Rock School District* v. *Borden, Inc.*, 1980-1 Trade Cas. ¶ 63,059 (E.D. Ark. 1979). In accordance with these authorities, this Court should at a minimum provide that no contribution claims will lie against settling defendants. Otherwise, independent settlement of multiparty antitrust cases usually would prove to be impossible.[27]

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[27] The extreme unfairness which would be imposed by permitting contribution claims against defendants which participated in joint defense efforts and settled cases in good faith prior to the creation of any new rule of contribution by this Court would almost certainly give rise to meritorious retroactivity and laches claims. Indeed, the majority of courts facing the issue have determined that new contribution rules should apply purely prospectively. See, e.g., Wesolowski v. Rhoades, 416 F.Supp. 1052, 1053 (E.D. Pa. 1976); Fraley v. Worthington, 64 F.R.D. 726, 728 (D. Wyo. 1974); United States Fidelity & Guaranty Co. v. The Park City Corp., 397 F.Supp. 411, 414 (D. Ore. 1973); Massey v. Sullivan Co., 464 S.W.2d 548, 549 (Tenn. 1971); Commercial Casualty Ins. Co. v. Leonard, 196 S.W.2d 919, 921 (Ark. 1946); Norfolk So. R. Co. v. Beskin, 125 S.E. 678 (Spec. Ct. App. Va. 1924). See also Weinberg v. Mitchell, 588 F.2d 275, 278 (9th Cir. 1978); In re Corrugated Container Antitrust Litigation, supra, 84 F.R.D. at 42.

CONCLUSION

For the foregoing reasons, Amicus Curiae Boise Cascade Corporation respectfully requests this Court to affirm the decision of the United States Court of Appeals for the Fifth Circuit to deny contribution in antitrust cases.

Dated: January 16, 1981

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned counsel of record for *amicus curiae* Boise Cascade Corporation hereby certifies that on January 16, 1981, three (3) copies of this Brief of Amicus Curiae Boise Cascade Corporation in Support of Respondents were placed in the United States Mail, properly addressed to counsel of record for each party separately represented herein, to wit:

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R. Clifford Potter

No. 79-1144

IN THE

Supreme Court of the United States

OCTOBER TERM 1980

TEXAS INDUSTRIES, INC.

Petitioner,

vs.

RADCLIFF MATERIALS, INC.,
JIMCO, INC., and OKC DREDGING, INC.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF AMICUS CURIAE, BORMAN'S, INC., A DELAWARE CORPORATION, IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

		PAGE
I.	Statement of Interest of Amicus Curiae	1
II.	Summary of Argument	2
III.	Argument	4
IV.	Conclusion	8

TABLE OF AUTHORITIES

Cases.

Group Life and Health Insurance Co. v. *Royal Drug Co.*, 440 U.S. 205, 99 S. Ct. 1067, 59 L.Ed. 2d 261 (1979). 4, 5

Pharmacists Guild of Michigan, et al. v. *Blue Cross and Blue Shield of Michigan, et al* (E.D. Mich. Civil Action No. 8-70149) 2

United States v. *Trenton Potteries Company*, 273 U.S. 392, 47 S. Ct. 377, 71 L.Ed. 700 (1927) 6

Statutes.

15 U.S.C. § 1012(b), 59 Stat. 34 4

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I.

STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus curiae, Borman's, Inc., operates a chain of retail pharmacies in Michigan. Borman's is one of three defendants in an antitrust action in the United States District Court for the

Eastern District of Michigan[1] In that litigation Borman's is accused of violating the antitrust laws merely because it is a participating provider in the Michigan Blue Cross and Blue Shield Prescription Drug Benefit Program. Although approximately 2000 pharmacies are participating providers, Borman's is one of only two providers who were named as defendants in the United States District Court action. Borman's operates the third largest pharmacy chain in Michigan. The two largest chains were not made defendants in the litigation.

Borman's has asserted a claim for contribution against a class of all participating providers in the Michigan Blue Cross and Blue Shield Prescription Drug Benefit Program who were not named as defendants. Borman's submits this Brief in support of Petitioner to bring to the Court's attention the urgent need for a right of contribution in antitrust cases in the health care industry. Borman's submits that justice may only be done by providing a right of contribution.

II.

SUMMARY OF ARGUMENT

Borman's is one of approximately 2,000 operators of retail pharmacies in Michigan who signed participation agreements with Blue Cross and Blue Shield of Michigan, Michigan's largest provider of health insurance. The provider agreements, which were neither drafted nor conceived by Borman's, require participating pharmacies to offer prescription drugs to Blue Cross subscribers in return for specified payments. Non-participating pharmacies receive no direct reimbursement from Blue Cross and Blue Shield of Michigan for prescription drugs sold to Blue Cross subscribers.

In 1978, a group of non-participating pharmacies sued Blue Cross and Blue Shield of Michigan and two retail pharmacy operators, including Borman's. *The actions of all retail*

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[1] *Pharmacists Guild of Michigan, et al.* v. *Blue Cross and Blue Shield of Michigan, et al* (E. D. Mich. Civil Action No. 8-70149).

pharmacies participating in the Prescription Drug Benefit Program are identical. Each retail pharmacy merely reviewed the proffered provider agreement and determined whether or not to execute it and abide by its terms. If in fact such provider agreements are determined to violate the antitrust laws, Borman's, absent a right of contribution, will be forced to bear a disproportionately large share of the total damages for reasons having no relation to its culpability. Rather, Borman's will be required to bear more than its fair share of the damage by reason of its fortuitous selection as a target defendant. The interests of justice require that if the Prescription Drug Benefit Program, and similar health care programs across the country, violate the antitrust laws, then no single participating health care provider should be required to bear the entire financial burden of the illegality. Without a right of contribution in such cases, competition may well be hindered because of the ability of competitors to select a competing defendant for financial ruin.

III.

ARGUMENT

Borman's brings to the attention of the Court a problem lurking but not raised in *Group Life and Health Insurance Co.* v. *Royal Drug Co.,* 440 U.S. 205, 99 S. Ct. 1067, 59 L.Ed. 2d 261 (1979). In *Royal Drug,* this Court ruled that a prescription drug benefit program sponsored by Texas Blue Shield was not the "business of insurance" within the meaning of the McCarran-Ferguson Act, 15 U.S.C. § 1012(b), 59 Stat. 34. The Court pointedly did not consider (1) whether the prescription drug provider agreements were illegal under the antitrust laws, *Group Life and Health Insurance Co.* v. *Royal Drug Co., supra,* at 210, or, (2) the question presently before the Court, whether, if the agreements were illegal, the provider defendants have a right of contribution against the participating pharmacies who were not named defendants, but who had signed exactly the same agreements. Borman's submits that justice requires that retail pharmacies who are participating providers in a prescription drug benefit program sponsored by a state Blue Cross and Blue Shield association should have a right of contribution against all other participating pharmacies.

The Prescription Drug Benefit Program of which Borman's is a participant is almost identical to that described in *Group Life and Health Insurance Co.* v. *Royal Drug Co., supra,* at 209. In the case in which Borman's is a defendant, plaintiffs, an organization of pharmacies, alleged price fixing and group boycott because of a series of individual participation agreements by which Michigan Blue Cross assures its insureds that they can receive pharmaceutical drugs upon payment of a small sum which is only a portion of the cost of the prescription drug. The remainder of the cost is paid directly to the participating pharmacy by Blue Cross. If, on the other hand, the insured purchases prescription drugs from a non-participating pharmacy, the insured is required to pay the full price charged by that pharmacy and seek reimbursement himself for a portion of

that cost from Blue Cross. The out-of-pocket cost for prescription drugs for an insured is higher if the insured purchases prescription drugs from a non-participating pharmacy.

The Michigan program was developed by Blue Cross to fulfill one of the conditions of the collective bargaining agreements between the United Auto Workers and the major automobile manufacturers. Blue Cross offered to enter into a participation agreement with each licensed pharmacy in the State of Michigan. Contracts were offered to individual retail pharmacies, who had the option of signing or rejecting the agreements. All contracts are identical in form and no retail pharmacy was allowed to negotiate differing terms with Blue Cross.

Whether a right of contribution among joint antitrust tortfeasors ought to exist, assuming antitrust liability, must be analyzed in the context of the particular type of market which exists in the health care industry.[2] Health care is an atypical sector of our economy. Demand for prescription drugs is controlled not by the consumer, but by his or her licensed physician. Registered pharmacists, who control the dispensation of prescription drugs, are prohibited by law from selling drugs without the order of a licensed physician. A significant amount of the payment for prescription drugs originates not with the consumer, but with his or her health insurer. Thus, the classic pattern of barter between a merchant and the consumer is absent. Between the retailer and the consumer stands the consumer's insurer and his or her physician. It is these two entities which determine the demand side of the economic equation.

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[2] The United States of America, acting as amicus curiae in *Group Life and Health Insurance Co.* v. *Royal Drug Co., supra,* at n. 5, has taken the position that the prescription drug benefit program probably does not violate the antitrust laws. Amicus agrees with this conclusion, but is nevertheless faced with being targeted as a defendant in a case, with the potential of ruinous damages being awarded against it, when it has engaged in no conduct different than any of the other pharmacies who signed identical contracts.

There has been tremendous national pressure over the last decade to slow the rate of inflation of health care costs. One of the purposes of the prescription drug benefit program in Michigan is to meet that goal. The Michigan program provides that Blue Cross will reimburse a providing pharmacy for its "acquisition cost", as that is determined by a Blue Cross study of prevailing costs. By not entering into cost-plus contracts, Blue Cross places some restraint on the amount of its expenditures for prescription drugs, and thus limits its increases in premiums. Any consideration of the impact of the antitrust laws on this and similar programs must take into account both the unusual nature of the health care economy and the impact such a decision will have on the important national goal of cost containment.

The way in which the prescription drug benefit program works guarantees that the participating retail pharmacies can, at most, be no more than passive antitrust tortfeasors. The program is not conceived, formulated or directed by the retail pharmacies. It is offered to all licensed pharmacies on an equal basis. *If the program is unlawful, no participating retail pharmacy is any more culpable than any other.* These facts distinguish this type of case from a classic price fixing scheme in which a few self selected competitors meet to determine prices. See, e.g., *United States* v. *Trenton Potteries Company,* 273 U.S. 392, 47 S. Ct. 377, 71 L.Ed. 700 (1927).

It would therefore be unjust in the extreme to require one of many such passive antitrust tortfeasors to bear the entire burden of the loss merely by reason of its fortuitous selection as a target defendant.

Moreover, the Court must consider the anticompetitive tendencies of a rule denying contribution in these cases. The litigation in which Borman's is involved was brought by its competitors. If successful, the litigation will result in higher prescription drug costs in Michigan (and thus higher health insurance premiums for those with prescription drug benefits),

a weakening of limits on the rapid escalation of prescription drug costs, and the imposition of a colossal judgment on one of many retail pharmacies for reasons having nothing to do with its culpability. Without a right of contribution, which would permit the loss to be spread among all participating pharmacies who are equally, though passively, responsible for any harm done to plaintiffs, a group of competitors would be able to saddle another competitor with large judgment costs for anti-competitive rather than pro-competitive purposes. Clearly, in such a case, it is the consumer who suffers from the diminution of competition.

Borman's does not suggest that if its participation in the Prescription Drug Benefit Program violates the antitrust laws it should escape liability. Quite the contrary. Rather, Borman's believes that because of the particular nature of the health care system and its own passive role in the Prescription Drug Benefit Program, it would be unjust to require it to pay more than its fair share. If anything, contribution will increase the likelihood of effectuating the deterrent purposes of the treble-damage rule because health care providers and retailers will be unlikely to gamble that they will completely escape liability if their contemplated action violates the antitrust laws.

IV.

CONCLUSION

Borman's submits that a right of contribution is necessary in antitrust cases to insure that in the event programs such as the Michigan Prescription Drug Benefit Program are found to be in violation of the antitrust laws, no single passive tortfeasor will be required to bear more than its fair share of liability to harmed plaintiffs. The decision of the court below should be reversed. At a minimum, the Court should not impose a *per se* ban on contribution, but should adopt a flexible rule, allowing for contribution, at least in those circumstances, as here, where no intentional conduct is involved.

Respectfully submitted,

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No. 79-1144

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

TEXAS INDUSTRIES, INC.,

Petitioner,

vs.

RADCLIFF MATERIALS, INC., et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MOTION AND BRIEF OF THE CORRUGATED CONTAINER CLASS IN M.D.L. 310 AS AMICUS CURIAE

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TABLE OF CONTENTS.

PAGE

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* i
INTEREST OF THE *AMICUS CURIAE* i
TABLE OF CASES AND AUTHORITIES v
SUMMARY OF ARGUMENT 1
ARGUMENT 4
I. THE RULE AGAINST CONTRIBUTION IN ANTITRUST CASES SHOULD NOT BE JUDICIALLY MODIFIED .....
A. The No-Contribution Rule is Well Established in Antitrust Cases 4
B. Congress Is the Appropriate Forum to Deal With the Contribution Question 6
1. Contribution is a policy question that is best left to Congress 6
2. Because Congress enacted the antitrust laws against a no-contribution background, the courts should not change the rule 9
II. CONTRIBUTION IS INCONSISTENT WITH THE ANTITRUST LAWS 10
A. The No-Contribution Rule Fosters Greater Deterrence 11
B. Contribution Would Unduly Interfere With the Manageability and Settlement of Antitrust Actions 13
III. THE NO-CONTRIBUTION RULE IS FAIR 16
A. There Was No Coercion, Intimidation or "Settlement Stampede" in M.D.L. 310 16
B. The No-Contribution Rule is Fair Particularly in Actions Brought Under Rule 23 19
IV. THE PROPORTIONAL CLAIM REDUCTION PROPOSED BY CERTAIN *AMICI* IS IMPROPER 21
A. Claim Reduction Should Not be Decided at This Time 23

B. The Existing, *Pro Tanto* Claim Reduction Rule Alone Comports With the Statutory Framework of the Antitrust Laws and Should Not be Altered by the Courts 23
C. The Proportional Claim Reduction Proposed by Certain *Amici* Would Violate the Intention of Congress to Fully Compensate Victims of Antitrust Violations 25
D. Proportional Claim Reduction Would Make Settlements Impossible and Render Antitrust Cases Extremely Complex 26
CONCLUSION 30

TABLE OF CASES AND AUTHORITIES

Cases.

	PAGE
American Motorcycle Assn. v. *Superior Court of Los Angeles County,* 578 P.2d 899 (1978)	24n.23
In re Ampicillin Antitrust Litigation, 917 Antitrust & Trade Reg. Rep. (BNA) 1 (D.D.C. 1979)	4
Arctic Structures, Inc. v. *Wedmore,* 605 P.2d 426 (Alas. 1979)	24n.23
Aro Mfg. Co. v. *Convertible Top Replacement Co.,* 377 U.S. 476 (1964)	22n.20
In re Auto Fleet Antitrust Litigation, M.D.L. 65 (N.D. Ill.)	19n.18
Bartle v. *Nutt,* 29 U.S. (4 Pet.) 184 (1830)	4
Baughman v. *Cooper-Jarrett, Inc.,* 391 F. Supp. 671 (W.D. Pa. 1975)	21
Baughman v. *Cooper-Jarrett, Inc.* 530 F.2d 529 (3d Cir. 1976)	22
Best v. *Yerkes,* 247 Iowa 800, 77 N.W. 2d 23 (1956)	5n.1
Broadcast Music, Inc. v. *Columbia Broadcasting System,* 441 U.S. 1 (1979)	12n.11
Cage v. *New York Central Railroad,* 276 F. Supp. 778 (W.D. Pa.), aff'd, 386 F.2d 998 (3rd Cir. 1967)	5n.1
Carrier's Insurance Exchange v. *Truck Insurance Exchange,* 310 F.2d 653 (4th Cir. 1962)	5n.1
Chevron Oil Co. v. *Huson,* 404 U.S. 97 (1971)	22n.21
City of Chicago v. *Robbins,* 67 U.S. (12 Black) 418 (1862)	4
Cooper Stevedoring Co. v. *Fritz Kopke, Inc.,* 417 U.S. 106 (1974)	9
In re Corrugated Container Antitrust Litigation, No. 79-2439 (5th Cir. Oct. 30, 1979)	4, 23
In re Corrugated Container Antitrust Litigation, 84 F.R.D. 40, (S.D. Tex. 1979)	13
Cotton v. *Hinton,* 559 F.2d 1326 (5th Cir. 1977)	13, 26

PAGE

Eastern Sugar Antitrust Litigation, MDL 201A (Ed. Pa. 1979) 5

Edmonds v. *Compagnie Generale Transatlantique*, 443, U.S. 256 (1979) 9

El Camino Glass v. *Sunglo Glass Co.*, 1977-1 Trade Cases (CCH) ¶ 61, 533 (N.D. Cal. 1976) 5

England v. *Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964) 22n.21

In re Fine Paper Antitrust Litigation, MDL 323 (E.D. Pa,) 4, 19n.18

Flintkote Co. v. *Lysfjord*, 246 F.2d 368 (9th Cir. 1957) 22

Florida Trailer & Equipment Co. v. *Deal*, 284 F.2d 567 (5th Cir. 1960) 26

Georges Radio v. *Capital Trans. Co.*, 126 F.2d 219 (D.C. Cir. 1942) 5n.1

Glus v. *G.C. Murphy Co.*, 629 F.2d 248 (3d Cir. 1980) 11n.10

Goldlawr, Inc. v. *Shubert*, 276 F.2d 614 (3d Cir. 1960) 4

Great Northern Ry. Co. v. *Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932) 22n.21

Halcyon Lines v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282 (1952) 9

Hanover Shoe, Inc. v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968) 13

Haynes v. *City of Nitro*, 240 S.E.2d 544 (W. Va. App. 1977) 5n.1

Hedges Enterprises v. *Continental Group, Inc.*, 1979-1 Trade Cases (CCH) ¶ 62,717 (E.D. Pa. 1979) 4

Herzfeld v. *Laventhal, Krekstein, Horwath & Horwath*, 540 F.2d 27 (2d Cir. 1976) 24

Hobbs v. *Hurley*, 117 Me. 449, 104 A. 815 (1918) .. 5n.1

PAGE

Illinois Brick v. *State of Illinois*, 431 U.S. 720 (1977) 10,13,26
Judson v. *Peoples Bank & Trust Co.*, 17 N.J. 67, 110 A.2d 24 (1954) 6n.2, 20n.19
Kohr v. *Alleghany Airlines, Inc.*, 504 F.2d 400 (7th Cir. 1974) 11n.10
Linkletter v. *Walker*, 381 U.S. 618 (1965) 22n.21
MacKethan v. *Burrus, Cootes & Burrus*, 545 F.2d 1388 (4th Cir. 1976) 24
Maryland Lumber Co. v. *White*, 197 A.2d 73 (Md. 1954) 24n.23
McLean v. *Alexander*, 449 F. Supp. 1251 (D.Del. 1978) 5n.2
Moyes v. *Spartan Asphalt*, 338 Mich. 314 (Mich. 1970) 5n.1
Murray v. *Reliance Ins. Co.*, 60 F.R.D. 390 (D. Minn. 1973) 5n.1
Newark Motor Inn Corp. v. *Fleck*, 1980-2 Trade Cas. ¶ 63,465 (D.N.J. 1980) 4
In re Nissan Antitrust Litigation, 577 F.2d 910 (5th Cir. 1978) 19n.18
Olson Farms, Inc. v. *Safeway Stores, Inc.*, 1979-2 Trade Cases (CCH) ¶ 62,995 (10th Cir. 1979) ... 4, 8
Perma Life Mufflers, Inc. v. *International Parts Co.*, 392 U.S. 134 (1968) 11
Pfizer v. *Government of India*, 434 U.S. 308 (1978) 10,26
Phillips v. *Chicago Mercantile Exchange*, No. 70 C 1216 (N.D. Ill. 1978) 19n.18
Professional Beauty Supply, Inc. v. *National Beauty Supply, Inc.*, 594 F.2d 1179 (8th Cir. 1979) 4
Reiter v. *Sonotone Corp.*, 442 U.S. 330 (1979) 7
Riss & Company, Inc. v. *Association of American Railroads*, 170 F. Supp. 354 (D.D.C. 1959) 21

PAGE

Royal Indemnity Co. v. *Aetna Casualty & Surety Co.*, 193 Neb. 752, 229 N.W. 2d 183 (1975)..... 5n.1
Sabre Shipping Corp. v. *American President Lines, Ltd.*, 298 F. Supp. 1339 (S.D.N.Y. 1969)..... 5
Selz v. *Unna*, 73 U.S. (6 Wall.) 327 (1867) 4
Sousa v. *Casey*, 111 R.I. 623, 306 A.2d 186 (1973) 6n.2
Tennant v. *Craig*, 195 S.E.2d 727 (W.Va.Apr. 1973)..... 24n.23
Union Stockyards Co. of Omaha v. *Chicago, Burlington & Quincy Railroad Co.*, 196 U.S. 217 (1905)..... 4
United States v. *Consolidated Packaging Corp.*, 575 F.2d 117 (7th Cir. 1978)..... iin.2, 10, 12n.11, 18
United States v. *Reliable Transfer Co.*, 421 U.S. 397 (1975)..... 14n.14
United States v. *Topco Associates*, 405 U.S. 596 (1972)..... 7
United States v. *United States Gypsum Co.*, 438 U.S. 422 (1978) 12n.11
Wainwright v. *Kraftco*, 58 F.R.D. 9 (N.D. Ga. 1973)..... 29
Washington Gaslight Co. v. *Lansden*, 172 U.S. 534 (1899)..... 4
Webster Motor Car Co. v. *Zell Motor Car Co.*, 234 F.2d 616..... 5n.2
Wilson P. Abraham Construction Corp. v. *Texas Industries, Inc.*, 604 F.2d 897 (5th Cir. 1979)..... 4, 12
Zenith Radio Corp. v. *Hazeltine Research, Inc.*, 401 U.S. 321 (1971) 22n.20

PAGE

Statutes and Rules

Alas. Stat. § 09.16.010 *et seq.*	5n.1, 7n.4
Ark. Stat. Ann. § 34-1001	7n.4, 8n.6
West's Ann. C.C.P. § 875	5n.1, 7n.4
Col. Rev. Stat. Tit. 13, Art. 50.5-101 *et seq.*	5n.1, 7n.4, 8n.6, 24n.23
Del. Code Ann. Tit. 10 § 6304(a)	7n.4, 8n.6, 24n.23
F.S.A. § 768.31	5n.1, 7n.4, 8n.7, 24n.23
Ga. Code Ann. § 105-2012	5n.1, 7n.4
Ga. Code Ann. § 37-303	7n.4
Haw. Rev. Stat. § 663-11 *et seq.*	7n.4, 8n.6, 24n.23
Idaho Code § 6-803 *et seq.*	7n.4, 8n.6
Ill. Rev. Stat. ch. 70 par 302, § 2(c)	8n.5, 24n.23
Kan. Stat. Ann. § 60-2413(b)	7n.4
Ky. Rev. Stat. § 412-030	5n.1, 7n.4
La. C. C. Comp. Ed. Art. 2103	7n.4
Md. Ann. Code Art. 50 § 17	7n.4
Ann. Laws Mass. ch. 231B	5n.1, 7n.4, 8n.5, 24n.23
Mich. C. L. A. § 600.2925	7n.4, 8n.5, 8n.7
Minn. Stat. Ann. ch. 604	7n.4, 8n.6
Miss. Code Ann. § 85-5-5	7n.4
Va. Mo. Stat. § 537.060	7n.4
Mont. Code Ann. § 27-1-703	7n.4
N.R.S. § 17.215	11
N.R.S. § 17-255	5n.1, 7n.4
N.R.S. § 17.245(2)	8n.5, 24n.23

N. H. Rev. Stat. Ann. § 507:7-b	7n.4, 24n.23
N.J. S.A. § 2A:53A:1	7n.4
N.M. Stat. Ann. § 41-3-1 *et seq.*	7n.4, 24n.23
N.Y. Civ. Prac. Law § 1401	5n.2, 7n.4
N.Y. Gent. Oblig. Law § 15-108	7n.4, 8n.5, 8n.6
N.C. Gen. Stat. § 1B-1 *et seq.*	5n.1, 7n.4, 8n.5, 24n.23
N.D. Cent. Code Ann. § 32-38-01 *et seq.*	5n.1, 7n.4, 8n.5, 8n.7, 24n.23
Ohio Stat. Ann. § 2307.31 *et seq.*	5n.1, 7n.4, 8n.5, 24n.23
Okl. St. Ann. Tit. 12 § 831 *et seq.*	7n.4
Ore. Code ch. 18.455	8n.5, 24n.23
P.S. Tit. 12, § 2082, *et seq.*	7n.4, 24n.23
R.I. Gen. Laws 10-6-1 *et seq.*	8n.6, 24n.23
S.D.C.L. § 15-8-11 *et seq.*	7n.4, 8n.6, 24n.23
Tenn. Code Ann. § 23-3101 *et seq.*	5n.1, 7n.4, 8n.5, 24n.23
Vernon's Ann. Civ. St. Art. 2212a § 2b	8n.4
Utah Code Ann. § 78-27-39 *et seq.*	8n.4, 8n.6, 24n.23
V.S.A. Tit. 12 § 1036	8n.4
Va. Code § 8-01-34	5n.1, 8n.4
W. Va. Code Ann. § 55-7-13	8n.4, 8n.5
Wy. Stat. Ann. § 1-1-110 *et seq.*	8n.4, 8n.5, 24n.23
Fed. R. Civ. P. 23	2, 16, 25, 27, 28
15 U.S.C.A. § 15	10, 25

PAGE

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Hearings before the Subcommittee on Antitrust, Monopoly and Business Rights of the Committee on the Judiciary, United States Senate, 96th Congress, June 8 and 12, 1979 ..... 10n.9

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Note, *Contribution in Antitrust Suits,* 63 Cornell L. Rev. 682 (1978) 12

Restatement (Second) of Torts § 879 35

Sellers, *Contribution in Antitrust Damage Actions,* 24 Vill. L. Rev. 829(1979) 27

Senate Bill 1496 10

Uniform Contribution Among Tortfeasors Act, § 4. 5,10,15n.15, 16, 24n.24

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

TEXAS INDUSTRIES, INC.,

Petitioner,

vs.

RADCLIFF MATERIALS, INC., et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MOTION OF THE CORRUGATED CONTAINER CLASS IN M.D.L. 310 FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

The certified class of purchasers of corrugated containers and sheets in *In re Corrugated Container Antitrust Litigation,* M.D.L. 310 (S.D. Tex.) (herein *"amicus"* or "The Corrugated Class") moves the Court for leave to submit this brief as *amicus curiae* and urges this Court to affirm the judgment of the Fifth Circuit and refuse to create new rules of contribution and claim reduction in antitrust cases.

INTEREST OF THE AMICUS CURIAE

Amicus is the Certified Class of purchasers of corrugated containers and sheets in M.D.L. 310. That action was brought by more than 100 purchasers of corrugated containers and

sheets against 37 corrugated manufacturers for fixing the prices of containers and sheets in violation of the federal antitrust laws. Prior to completion of the trial, all defendants but one settled with the Class, paying more than $300 million in settlement. The one non-settling defendant, the Mead Corporation ("Mead"), proceeded to trial. After a 4½ month trial, the jury found Mead guilty of conspiring with at least 20 other corrugated manufacturers to fix the prices of corrugated containers and sheets.[1]

The Class numbers more than 300,000 and includes members ranging in size from the largest corporations in the country, including most of the Fortune 500, to small neighborhood and family businesses. All Corrugated Class members have one thing in common: they purchased corrugated containers or sheets directly from one or more of the defendants in M.D.L. 310, and they were damaged by those defendants who participated in a classic price-fixing scheme in violation of Section 1 of the Sherman Act.[2]

The Corrugated Class' interest in the issues raised by Petitioner and the various *amici* who have filed briefs is as follows:

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[1] The other M.D.L. 310 defendants found by the jury to have conspired with Mead are: Alton Box Board Company; Boise Cascade Corporation; Consolidated Packaging Corporation; Container Corporation of America; The Continental Group, Inc.; Crown Zellerback Corporation; Hoerner Waldorf Corporation; Inland Container Corporation; International Paper Company; Interstate Container Company; MacMillan Bloedel, Inc.; Olinkraft, Inc.; Owens-Illinois, Inc.; Packaging Corporation of America; St. Joe Paper Company; St. Regis Paper Company; Southwest Forest Industries, Inc.; Stone Container Corporation; Weyerhauser Company.

[2] A rare insight into how such a widespread price-fixing scheme operated in a sister industry is found in the Seventh Circuit's opinion in *United States* v. *Consolidated Packaging Corp.*, 575 F.2d 117 (7th Cir., 1978).

1. The long standing rule of no contribution which is challenged by the Petitioner is of vital importance to the continued viability of private enforcement of the antitrust laws through the class action device. Not only are the manageability and settlement potential of such actions threatened by abandonment of the no-contribution rule, but the protections contained within the class action device itself make inapplicable certain of the policy considerations suggested by the Petitioner and others supporting contribution. Yet the case before the Court is not a class action and fails to bring to the Court's attention these crucial concerns and differences which the Corrugated Class *amicus* will provide.

2. There is at present no brief filed with this Court by any *plaintiff*, as the dispute in the case before the Court involves only defendants and third party defendants and no threat to the plaintiff. This Corrugated Class *amicus* will provide the Court with a view of the important concerns of plaintiffs, including management of the case and settlement potential, which are necessary to foster private damage actions which this Court has always found to be essential to the effective enforcement of the antitrust laws.

3. The *Texas Industries* litigation presents the questions whether contribution should be permitted where major co-conspirators have been omitted from the lawsuit. As certain *amici* concede, this is a rare occurrence, for antitrust plaintiffs typically join all likely defendants, *see Amicus* Brief of Olson Farms, Inc. at 16; *Amicus* Brief of Georgia-Pacific Corporation and Packaging Corporation of America at 5. No claim of collusion or failure to name conspicuous co-conspirators can be leveled against the *Corrugated Class* plaintiffs. Even if measures were necessary to deal with the problem of omitted defendants in cases like *Texas Industries*, different considerations apply in cases like M.D.L. 310 and can be best presented by *amici* from that case.

4. Those defendants in M.D.L. 310 who have filed *amicus* briefs in this cause urging the Court to create new private rights of contribution have also sought a new right to claim reduction in antitrust cases. In view of the jury verdict against Mead for price fixing in M.D.L. 310 and the likelihood that the trial court will award a substantial judgment for damages against Mead, the members of the Corrugated Class have a vital interest in avoiding any risk of having that damage judgment diminished should this Court create a new right of claim reduction.

5. Although all M.D.L. 310 defendants except Mead have settled with the Corrugated Class, approval of those settlements by the district court is now on appeal to the Fifth Circuit. A reversal of the orders approving the settlements could result in M.D.L. 310 starting afresh, in which case a new rule allowing contribution (or claim reduction) could have a serious and adverse effect on the rights of the Corrugated Class members.

6. Mead argues that it has preserved its right to assert claims for contribution and claim reduction against other M.D.L. 310 defendants, *Amicus* Brief at 3; and certain settling defendants in M.D.L. 310 have claimed that if this Court were to create a retroactive rule of contribution, such a ruling might affect the settlements already made. The Corrugated Class denies that these contentions of Mead and certain M.D.L. 310 defendants have any merit, but these issues have been raised, and an affirmance by this Court of the present rule against contribution and claim reduction would resolve those issues in a manner consistent with the best interests of the Corrugated Class members.

7. Those defendants in M.D.L. 310 who have filed *amicus* briefs supporting contribution have presented a picture of that case which is so distorted and bears so little resemblance to what in fact occurred that it is important to have the record set straight.

For the foregoing reasons, the Corrugated Class in M.D.L. 310 asks leave to file the following brief as *amicus curiae.*

Dated: January 16, 1981

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

TEXAS INDUSTRIES, INC.,

Petitioner,

vs.

RADCLIFF MATERIALS, INC., et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF THE CORRUGATED CONTAINER CLASS IN M.D.L. 310 AS AMICUS CURIAE

SUMMARY OF ARGUMENT

The long standing common law rule disallowing contribution is particularly well-established where intentional conduct, like price-fixing, is involved. In the 80-year history of the antitrust acts, only one court has permitted contribution, and that case did not involve either price fixing or a class action and the guarantee of good-faith court-approved settlement which class actions insure.

This Court should not create a new rule allowing contribution, particularly in view of the intense study given this issue recently by Congress. The policy decisions and impact on the country's economy involved in formulating any rule of contribution are best considered by the legislative branch, not the judicial. The damages provisions of the antitrust laws, granting

mandatory treble damages and attorney fees to prevailing plaintiffs do not suggest any congressional intent that culpable defendants should be able to lighten their own burden by shifting a portion of the judgment to other defendants. To the contrary, allowing contribution could drastically upset the legislative scheme by eroding the effective deterrent of joint and several liability and removing the incentives to private enforcement, which is an essential adjunct to governmental enforcement of antitrust laws.

The no-contribution rule fosters deterrence and is based on sound economic theory. The strict sanctions of the antitrust laws must not be undercut by a contribution rule that would allow intentional wrongdoers to dilute the burden of their wrongdoing by treating the substantially diminished cost of liability for price-fixing as just another expense of doing business.

The no-contribution rule is also essential to settlement, and settlements must not be chilled if plaintiffs are to be capable of managing the complex litigation which inevitably arises as a result of massive, nationwide price-fixing conspiracies like that presented in M.D.L. 310. If settlements could not be achieved, many plaintiffs would be discouraged from initiating private antitrust lawsuits, and even where suits were brought, the presentation to the jury would be unwieldy. Yet contribution would greatly inhibit settlements because defendants would be unable to buy peace unless plaintiffs were willing to give up too large a portion of their total claim against remaining defendants.

The M.D.L. 310 defendants' plea for "fairness" is nothing more than an appeal for an end to joint and several liability. They ask the Court for lenient treatment of price fixers and a judicial re-writing of the antitrust laws. There is no claim of collusion or anything but evenhanded treatment in M.D.L. 310, where the lower court's continued and close supervision, required under Fed. R. Civ. P. 23, insured good-faith dealings

and fair and reasonable settlements. For those defendants, such as Mead, who refused to settle and chose to stand trial, no purpose is served by diluting their damages after they have been found guilty of conspiring to fix prices. Any leniency shown to those found liable would only encourage price fixing in the future.

"Claim reduction," as the M.D.L. 310 defendants use the term, arises only in a settlement context and is not an issue in this case. Certain *amici's* arguments for their form of claim reduction are, in reality, claims for contribution from the plaintiffs rather than from co-conspirators. The only proper form of reduction of plaintiffs' claims, *pro tanto* (dollar-for-dollar) claim reduction, has long been established in antitrust law and insures that plaintiffs will not receive a multiple recovery. The version of claim reduction which certain M.D.L. 310 defendants propose would reward those who are found guilty of antitrust violations at the expense of plaintiffs, and would make antitrust actions exceedingly complex and settlement virtually impossible.

Finally, the claims of abuse, coercion, legalized blackmail of innocent defendants, settlement stampedes and the full parade of horribles blamed on the no-contribution rule by the M.D.L. 310 defendants, and Mead most particularly, are simply hogwash. The way for businesspeople to avoid the serious treble damage penalties under the antitrust laws is not by this Court creating new rights of contribution or "claim reduction" but by simply not conspiring to fix prices, as the jury in M.D.L. 310 found Mead did with at least 20 other corrugated manufacturers. Innocent businesspeople have no reason to fear; those antitrust actions which lack merit are consistently thrown out by the courts, or defendants are found not liable by juries. The 37 defendants in M.D.L. 310 who paid more than $300 million in settlements of the Class' claims against them did so not because of "legalized blackmail" but because they

recognized the very real likelihood that a jury would find them, like Mead, guilty of conspiring to fix prices in the corrugated industry.

ARGUMENT

I. THE RULE AGAINST CONTRIBUTION IN ANTITRUST CASES SHOULD NOT BE JUDICIALLY MODIFIED

A. The No-Contribution Rule is Well Established in Antitrust Cases

At common law, contribution is not allowed among joint tortfeasors. This rule has been in effect for 150 years in the United States, *Bartle* v. *Nutt*, 29 U. S. (4 Pet.) 184 (1830). *See also, Union Stockyards Co. of Omaha* v. *Chicago, Burlington & Quincy Ry. Co.*, 196 U.S. 217 (1905); *Washington Gaslight Co.* v. *Lansden*, 172 U.S. 534 (1899); *Selz* v. *Unna*, 73 U.S. (6 Wall.) 327 (1867); *City of Chicago* v. *Robbins*, 67 U.S. (12 Black) 418 (1862). As this Court stated in *Union Stockyards:*

> [T]he general principle of law is well settled that one of several wrongdoers cannot recover against another wrongdoer, although he may have been compelled to pay all the damages for the wrong done.

196 U.S. at 224.

With only one exception, *Professional Beauty Supply, Inc.* v. *National Beauty Supply, Inc.*, 594 F. 2d 1179 (8th Cir. 1979), the rule denying contribution has been followed consistently by every court addressing the question in antitrust cases. *Olson Farms, Inc.* v. *Safeway Stores, Inc.*, 1979-2 Trade Cases (CCH) ¶62,995 (10th Cir. 1979); *Wilson P. Abraham Construction Corp.* v. *Texas Industries, Inc.*, 604 F. 2d 897 (5th Cir. 1979); *In re Corrugated Container Antitrust Litigation*, No. 79-2439 (5th Cir. Oct. 30, 1979); *Goldlawr, Inc.* v. *Shubert*, 276 F. 2d 614 (3rd Cir. 1960); *Newark Motor Inn Corp.* v. *Fleck*, 1980-2 Trade Cases ¶63,465 (D.N.J. 1980); *In re Fine Paper Antitrust Litigation*, M.D.L. 323 (E.D. Pa. August 3, 1979); *Hedges Enterprises* v. *Continental Group, Inc.*, 1979-1 Trade Cases (CCH) ¶62,717 (E.D. Pa. 1979); *In re Ampicillin Antitrust*

Litigation, 917 ANTITRUST & TRADE REG. REP. (BNA) 1 (D.D.C. 1979); *Eastern Sugar Antitrust Litigation,* M.D.L. 201A (E.D. Pa. 1979); *El Camino Glass* v. *Sunglo Glass Co.,* 1977-1 Trade Cases (CCH) ¶61,533 (N.D. Cal. 1976); *Sabre Shipping Corp.* v. *American President Lines, Ltd.,* 298 F. Supp. 1339 (S.D. N.Y. 1969).

Even though the no-contribution rule has largely been abolished where negligent conduct is involved, it continues to be well-established for intentional torts. The Uniform Contribution Among Tortfeasors Act, as revised in 1955, denies any right of contribution to a party which has intentionally caused or contributed to the injury, U.C.T.A. § 1(c). Twenty-two of the states which have considered the issue have expressly disallowed contribution for intentional torts,[1] and only five states have allowed it.[2]

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[1] Alaska: Alas. Stat. § 09.16.020(1); California: West's Ann. C.C.P. § 875; Colorado: Col. Rev. Stat. Tit. 13, Art 50.5-101(3); District of Columbia: *Georges Radio* v. *Capital Trans. Co.,* 126 F. 2d 219 (D.C. Cir. 1942); Florida: F.S.A. § 768.31(2)(c); Georgia: Ga. Code Ann. § 105-2012(1); Iowa: *Best* v. *Yerkes,* 247 Iowa 800, 77 N.W. 2d 23(1956); Kentucky: Ky. Rev. Stat. § 412-030; Maine: *Hobbs* v. *Hurley,* 117 Me. 449, 104 A. 815 (1918); Massachusetts: Ann. Laws Mass. ch. 231 B §§ 1-4 (1979); Michigan: *Moyes* v. *Spartan Asphalt,* 338 Mich. 314, 334 (Mich. 1970); Minnesota: *Murray* v. *Reliance Ins. Co.,* 60 F. R. D. 390 (D. Minn. 1973); Nebraska: *Royal Indemnity Co.* v. *Aetna Casualty & Surety Co.,* 193 Neb. 752, 229 N. W. 2d 183 (1975); Nevada: N. R. S. § 17.255; North Carolina: N.C. Gen. Stat. § 1B-1(c); North Dakota: N.D. Cent. Code Ann. § 32-38-01(3); Ohio: Ohio Stat. Ann. § 2307.31(A); Oklahoma: Okl. St. Ann. Tit. 12 § 832(c); Pennsylvania: *Cage* v. *New York Central Railroad,* 276 F. Supp. 778 (W.D. Pa), aff'd, 386 F. 2d 998 (3d Cir. 1967); Tennessee: Tenn. Code Ann. § 23-3102(c); Virginia: Va. Code § 8-01-34, *Carrier's Insurance Exchange* v. *Truck Insurance Exchange,* 310 F. 2d 653, 658-59 (4th Cir. 1962); West Virginia: *Haynes* v. *City of Nitro,* 240 S.E. 2d 544 (1977).

[2] Delaware: *McLean* v. *Alexander,* 449 F. Supp. 1251 (D. Del. 1978); Maryland: *Webster Motor Car Co.* v. *Zell Motor Car Co.,* 234

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While this Court has permitted contribution where negligent conduct is involved, *United States* v. *Reliable Transfer Co.*, 421 U. S. 397 (1975); *Cooper Stevedoring Co.* v. *Fritz Kopke, Inc.*, 417 U. S. 106 (1974), price-fixing involves intentional conduct. In antitrust cases, the no-contribution rule is thus a sound one which should be followed.

B. Congress Is the Appropriate Forum to Deal with the Contribution Question

If the common law rule against contribution in antitrust cases were ever to be changed, such a decision should be left for Congress rather than being undertaken by the judiciary. Congress is the appropriate body to make the policy decisions required. Furthermore, where Congress has acted against a background of common law, this Court has held that the judiciary has less liberty to interfere.

1. Contribution is a policy question that is best left to Congress

Congress, unlike the Court, has the ability to determine what effect a contribution rule would have on competition. Because of its ability to conduct hearings, to question experts and to finance objective in-depth studies, Congress is by far the best forum to consider and attempt to accommodate the many diverse interests which should be weighed if the common law rule were to be changed. Among the issues which Congress would have to resolve are: the availability of contribution where willful conduct is involved, the availability of contribution where settlements are involved, the appropriate measure of contribution, and whether contribution may be assessed only

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F. 2d 616 (4th Cir. 1956); New Jersey: *Judson* v. *Peoples Bank & Trust Co.*, 17 N.J. 67, 110 A. 2d 24 (1954); New York: N.Y. Civ. Prac. Law § 1401:3; Rhode Island: *Sousa* v. *Casey*, 111 R. I. 623, 306 A. 2d 186 (1973)

against defendants or against plaintiffs ("claim reduction").[3] These are policy questions best entrusted to Congress. *See Reiter* v. *Sonotone Corp.,* 442 U. S. 330, 345 (1979). As this Court has recognized, especially in the antitrust context:

> Private forces are too keenly aware of their own interests in making such decisions and courts are ill-equipped and ill-situated for such decision making. To analyze, interpret, and evaluate the myriad competing interests and the endless data that would surely be brought to bear on such decisions, and to make the delicate judgment on the relative values to society of competitive areas of the economy, the judgment of the elected representatives of the people is required.

United States v. *Topco Associates,* 405 U. S. 596, 611-12 (1972).

Evolving state law on contribution illustrates the myriad differing conclusions which can be reached. Thirty-nine of the 44 states which allow any form of contribution do so by statute.[4] Of these states that allow contribution by statute,

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[3] The phrases "claim reduction," "carve-out" and "proportionate liability" as used in the briefs of certain *amici* all amount to contribution from the plaintiffs instead of settling defendants.

[4] Alas. Stat. § 09.16.101 *et. seq.;* Ark. Stat. Ann. § 34-1001 *et seq.;* West's Ann. C.C.P. § 875 *et seq.;* Col. Rev. Stat. Tit. 13, Art. 50.5-101 *et seq.;* Del. Code Ann. Tit. 10 § 6301 *et seq.*; F.S.A. § 768.31; Ga. Code Ann. § 105-2012, § 37-303; Haw. Rev. Stat. § 663-11; Idaho Code § 6-803(1) *et seq.*; Kan. Stat. Ann. § 60-2413(b); Ky. Rev. Stat. § 412-030; La. C.C. Comp. Ed. Art. 2103; Md. Ann. Code Art. 50 § 17; Ann. Laws Mass. ch. 231B § 1 *et seq.*; Mich. C.L.A. § 600.2925; Minn. Stat. Ann. § 604.01; Miss. Code Ann. § 85-5-5; Vernons Ann. Mo. Stat. § 537.060; Mont. Code Ann. § 27-1-703; N.R.S. § 17.225; N.H. Rev. Stat. Ann. § 507:7-b; N.J.S.A. § 2A:53A: 1 *et seq.*; N.M. Stat. Ann. § 41-3-1; N.Y. Civ. Prac. Law § 1401, § 15-108; N.C. Gen. Stat. § 1B-1 *et seq.*; N.D. Cent. Code § 32-38-01; Ohio Stat. Ann. § 2307.31; Okl. St. Ann. § 12-832; Ore. Code ch. 18.430; P.S. Tit. 12, § 2082, Tit. 42 § 8321; R.I. Gen Laws § 10-6-1; S.D. Comp. Laws § 15-8-11; Tenn. Code Ann. § 23-3101;

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fifteen specifically deny contribution for intentional suits while only one, New York, specifically permits it; thirteen specifically preclude suits against settling defendants[5] while eleven specifically permit such suits; and ten base contribution on relative fault[6] whereas three provide for strictly equal shares.[7] The Tenth Circuit recognized the difficulties inherent in any contribution rule:

> Before entering such a complex policy thicket, ... we believe this court should await a clear signal, at least, from the legislative branch of our government on the matter. Certainly, the Congress, assisted by the resources of the executive branch, is in a far superior and more appropriate position to gauge the impact on observance and enforcement of the antitrust laws from contribution and its various facets of implementation.

Olson Farms, Inc. v. *Safeway Stores, Inc.*, 1979-2 Trade Cases ¶ 62,995 at 79,704 (10th Cir. 1979).

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Tex. Civ. Code Ann. Art 2212a § 2b; Utah Code Ann. § 78-27-39; V.S.A. tit. 12 § 1036; Va. Code § 8-01-34; W. Va. Code Ann. § 55-7-13; Wy. Stat. Ann. § 1-1-110.

[5] Contribution is not allowed against settling defendants in Florida, F. S. A. § 768.31(5)(b); Illinois, Ill. Rev. Stat. ch. 70 § 302(c); Massachusetts, Ann. Law Mass. ch. 231 B § 4(b); Michigan, M.C.L.A. § 600.2925d(c); Nevada, N. R. S. § 17.245(2); New York, N.Y. Genl. Oblig. Law § 15-108(b); North Carolina, N.C. Gen. Stat. § 1B-4(2); North Dakota, N.D. Cent. Code § 32-38-04(2); Ohio, Ohio Stat. Ann. § 2307.32(F)(1); Oregon, Ore. Code ch. 18.455(b); Tennessee, Tenn. Code Ann. § 23-3105(b); West Virginia, W.Va. Code Ann. § 55-7-13; Wyoming, Wy. Stat. Ann. § 1-1-113(a)(ii).

[6] Arkansas, Ark. Stat. Ann. § 34-1002(4); Colorado, Col. Rev. Stat. Tit. 13 Art. 50.5-103; Delaware, Del. Code Ann. Tit. 10 § 6302(d); Hawaii, Haw. Rev. Stat. § 663-12; Idaho, Idaho Code § 6-803(3): Minnesota, Minn. Stat. Ann. § 604.02; New York, N.Y. Genl. Oblig. Law § 15-108(a); Rhode Island, R.I. Gen. Laws § 10-6-3; South Dakota, S. D. C. L. Ann. § 15-8-15; Utah, Utah Code Ann. § 78-27-40(2).

[7] Florida, F. S. A. § 768.31(5)(a); Michigan, M. C. L. A. § 600.2925b(a); North Dakota, N.D. Cent. Code § 32-38-02.

To allow contribution may thus open a Pandora's box of problems. While the Court could pick and choose among the various combinations of contribution rules, both procedural and substantive, it would be wiser to leave such decisions to the Congress. The question of contribution, with all its ramifications, is best suited for congressional, not judicial, determination.

2. Because Congress enacted the antitrust laws against a no-contribution background, the courts should not change the rule

When Congress enacted the antitrust laws, it did so against a strong common law background which disallowed contribution—a rule that was *without exception* where intentional torts were concerned. As this Court cautioned in *Edmonds* v. *Compagnie Generale Transatlantique,* 443 U. S. 256 (1979):

> Once Congress has relied upon conditions that the courts have created, we are not as free as we would otherwise be to change them.

443 U. S. at 273. In *Edmonds,* the Court recognized that by changing a rule which Congress understood to be the law and did not itself choose to modify, the Court might "knock out of kilter" the delicate balance between statutory and common law. *Id.*[8] Congress' reliance on the no-contribution rule is reflected both in the fact that it has not acted to change the law in its 80-

[8] Likewise in *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.,* 342 U. S. 282 (1952), the Court stated the principal that, "In the absence of legislation, courts exercising a common law jurisdiction generally have held that they cannot on their own initiative create an enforceable right of contribution as between joint tortfeasors." 342 U. S. at 285. While the Court subsequently decided that a correct reading of the common law of admiralty itself favored contribution, *Cooper Stevedoring Inc.* v. *Fritz Kopke, Inc.,* 417 U. S. 106 (1974), the result leaves intact the reasoning of *Halcyon* suggesting a no contribution rule in the antitrust context.

year history, and in recent amendments, Antitrust Improvement Act of 1976, 15 U. S. C. A. § 15(c), where Congress provided for *parens patriae* actions brought by state attorneys general and expressly reiterated the traditional method whereby non-settling defendants receive dollar-for-dollar credit for amounts received by plaintiffs, but did not provide for contribution. Because the framework of the antitrust laws was set up against this strong no-contribution background and had not been changed by Congress, the Court should be especially hesitant to modify the long-standing common law disallowing contribution.[9]

II. CONTRIBUTION IS INCONSISTENT WITH THE ANTITRUST LAWS

The primary purposes of the antitrust laws are deterrence of would-be wrongdoers and compensation of victims. *Pfizer* v. *Government of India,* 434 U. S. 308 (1978); *Illinois Brick Co.* v. *State of Illinois,* 431 U. S. 720 (1977). The legislative scheme adopted by Congress included provisions to achieve these goals, including criminal penalties, treble damages to civil plaintiffs, and the mandatory award of attorneys fees to the successful civil litigant. 15 U. S. C. § 15. The seriousness of antitrust violations in general and of price-fixing offenses in particular has been underscored repeatedly by the federal courts. *See United States* v. *Consolidated Packaging Corp.,* 575 F. 2d 117, 126 (7th Cir. 1978) (a price-fixing case in an industry related to corrugated containers). The distinctions between the antitrust

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[9] Reserving the contribution question for Congress is particularly appropriate in view of Congress' recent in-depth study of this very question, *see* Hearings before the Subcommittee on Antitrust, Monopoly and Business Rights of the Committee on the Judiciary, United States Senate, 96th Congress, June 8 and 12, 1979. A bill which would allow a form of contribution has been introduced in Congress, S. 1496. In fact, as Mead points out in its *amicus* brief at 11, the Senate has already considered the specifics of the Corrugated Container antitrust case and the arguments raised by Mead against contribution; and yet neither house of Congress has seen fit to pass the bill.

laws and other statutes is a strong indication that Congress intended to deal more strictly with antitrust wrongdoers.[10]

Contribution is inimical to these primary purposes of the antitrust laws. Contribution relaxes deterrence and, as will be shown below, effectively decreases compensation to victims.

A. The No-Contribution Rule Fosters Greater Deterrence

Joint and several liability is a necessary adjunct to the deterrent effect which Congress intended for the antitrust laws. Any single conspirator, regardless of the culpability of its companions, may be held liable for all damages. *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U. S. 134, 144 (1968). Joint and several liability has always been viewed as a deterrent to intentional wrongful activities. Moreover, it is most fairly applied precisely in the antitrust context, where there would be no crime at all without the existence of multiple intentional wrongdoers.

The petitioners and certain *amici* have argued that a rule of contribution would further the goal of deterrence of antitrust violations because it would ensure that every defendant would pay at least something. This argument is suspicious, coming out of the mouths of the companies whose conspiratorial conduct is sought to be deterred, and it is untrue in fact.[11]

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[10] The stern sanctions of the antitrust laws contrast sharply with those imposed by Congress under other statutes such as the securities laws, where only single damages are recoverable and plaintiffs' attorney fees are not imposed on the defendants. Even if certain lower court decisions to allow contribution in other contexts were correct, *e.g.*, *Kohr* v. *Allegheny Airlines, Inc.* 504 F. 2d 400 (7th Cir. 1974) (airline accidents), *Glus* v. *G.C. Murphy Co.*, 629 F.2d 248 (3d Cir. 1980) (Title VII), contribution should not be allowed in the antitrust context because of the need to strongly deter such violations, encourage private lawsuits and fully compensate victims.

[11] *Amici* Georgia-Pacific Corporation ("G-P") and Packaging Corporation of America ("PCA") implicitly admit that the no

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The theory that contribution increases deterrence is directly contrary to sound economic theory, as the Circuit Court noted. *Wilson P. Abraham Construction Co.* v. *Texas Industries, Inc.*, 604 F. 2d 897, 901 n. 8 (5th Cir. 1979), citing Note, *Contribution in Antitrust Suits,* 63 Cornell L. Rev. 682, 702 (1978). Economists and commentators agree that the traditional no-contribution rule discourages illegal conduct because most would-be participants are risk-averse, taking more precautions to avoid a smaller chance of a large judgment than a larger chance of facing a smaller judgment. *See* Easterbrook, Landes & Posner, *Contribution Among Antitrust Defendants: A Legal and Economic Analysis,* 23 J. Law & Economics 331, 332 (1980) (hereinafter "*Easterbrook, Landes & Posner*") (which concludes unequivocally, "we make clear that a rule of no contribution provides greater deterrence to violations under the antitrust laws than any rule of contribution."); Leon, *Contribution for Antitrust Defendants,* 66 Va. L. Rev. 797, 820, 821 (1980), (hereinafter "*Leon*") (which concludes that with *per se* violations like price fixing, the greater deterrence provided by a no-contribution rule is to be preferred).

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contribution rule produces greater deterrence when they argue, Brief at 15, that the denial of contribution leads to overdeterrence. Although they complain of chilling socially beneficial conduct, Brief at 20 n. 29, the very case they cite, *Broadcast Music, Inc.* v. *Columbia Broadcasting System,* 441 U. S. 1 (1979), draws the distinction between "naked price-fixing schemes," like the scheme in M.D.L. 310, and practices of questionable or marginal legality. 441 U. S. at 13. In *United States* v. *United States Gypsum Co.* 438 U. S. 422, 440-41 (1978), this Court also distinguished between *per se* antitrust violations, like those of which Mead was recently found guilty, and other conduct which is not *per se* illegal. The Court noted that *per se* illegal conduct has "unquestionable anticompetitive effects," while other conduct may or may not be anticompetitive, depending on the circumstances and the purposes it is serving. Furthermore, the jury verdict of Mead's guilt in M.D.L. 310 and the Seventh Circuit rulings in *United States* v. *Consolidated Packaging Corp.*, 575 F. 2d 117 (7th Cir. 1978), illustrate the fact that overdeterrence is not a problem in the paper industry.

In addition, the no-contribution rule helps prevent the type of cost-benefit analysis of a potential price-fixing conspiracy that would so readily occur if each defendant knew in advance that it would have to pay only a predictable share of the conspiracy damages. *See Leon* at 820. Because the goal of the antitrust laws is to discourage *all* price-fixing, and not just that which is cost-inefficient to the corporation, the no-contribution rule should be retained.

B. Contribution Would Unduly Interfere with the Manageability and Settlement of Antitrust Actions

This Court has consistently recognized that private actions are an "important weapon of antitrust enforcement" and has endorsed the need to eliminate complexities that would discourage private enforcement. *Illinois Brick Co.* v. *State of Illinois,* 431 U. S. 720, 745 (1977); *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp,* 392 U. S. 481, (1968). Courts must be attuned to the needs of plaintiffs to manage antitrust actions which are already "most complex." *Cotton* v. *Hinton,* 559 F.2d 1326, 1331 (5th Cir. 1977). Settlements are an extremely important element of plaintiffs' ability to manage their case. *See, e.g., In re Corrugated Container Antitrust Litigation,* 84 F.R.D. 40 (S.D. Tex. 1979); *Leon* at 821 n. 166.[12] A rule of contribution would pose difficulties to manage-

[12] Indeed, in a neutral context outside the adversary process, prominent defense counsel have conceded that contribution is unworkable.

> To allow contribution among conspirators would, however, add new complications to the inextricable maze of class antitrust litigation. . . . To permit defendants to seek contribution from one another would . . . greatly complicate antitrust litigation which is already labyrinthine. Plaintiffs might even lose control of their cases with defendants vouching in other members of the industry and filing cross-claims against one another.

Izard & Miller, *High Price-Fixing Awards Require Abolition of Joint, Several Liability,* 1 Nat. Law J. 22, 23 (August 27, 1979).

ability in general, and to settlements in particular, in all stages of the case.

A rule of contribution would produce such a proliferation of claims that it would undermine plaintiffs' ability to manage their case. In M.D.L. 310, for example, the existence of 38 defendants could produce over 1400 potential cross-claims for contribution. Even where all significant conspirators were named as defendants by plaintiffs, as in M.D.L. 310, the cross-claims which would remain even after plaintiffs had settled with some defendants would make discovery and trial protracted, confusing, and unwieldy. Plaintiffs' claims could become lost among the multitude of defendants' claims. The burden on the judicial system would also be enormous.[13] Facing such lengthy and complex litigation, many potential plaintiffs would be chilled from bringing suit. Furthermore, settlement would be unlikely in this morass of defendants' claims because as a practical matter no settlement could be effected unless it included all defendants so that each settlor could be assured of protection from other defendants.[14]

Settlements are also important as a means of reducing litigation expenses, which could escalate out of all bounds if, for example, the 1400 claims for contribution in M. D. L. 310 were

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[13] The trial in M.D.L. 310 took 4½ months when tried against only three defendants, two of whom settled before the trial was completed. If cross-claims for contribution had also been in the case, the trial could have easily taken a year or longer.

[14] "Claim reduction" is no answer to this problem for, as explained below, claim reduction prevents settlements. See pp. 26-29 *infra*. The situation envisioned in *United States* v. *Reliable Transfer Co.*, 421 U. S. 397, 408 (1975), where simultaneous settlements with all the defendants have been possible in admiralty or personal injury cases, is virtually impossible in antitrust cases because of the large number of diversely situated defendants who are typically members of such conspiracies. Coordinated settlements with all such defendants in a case such as M.D.L. 310, involving 38 co-defendants, is simply not possible.

tried to a jury. Plaintiffs are typically out-of-pocket all the litigation expenses for several years even with settlements. The expenses, and the period of time before expenses were recoverable, could multiply several score if settlement could not be reached.

Certain *amici* paint a picture of a so-called settlement stampede which occurs under the no-contribution rule. However, scholars who have studied the mechanics of settlement conclude that if contribution were allowed, a mirror-image stampede *not* to settle would occur. *See Easterbrook, Landes & Posner* at 362; *Leon* at 819. Professor Leon concludes that with contribution a defendant would be unlikely to settle because the defendant could save nothing but litigation costs; moreover, if the settling defendant were still liable to other defendants for a contributive share even after settling with the plaintiffs, the would-be settlor would remain in the case and would not save even litigation expenses. There would, quite simply, be no incentive to settle.

The inhibitions which contribution would create for settlements were considered by the Commission on Uniform State Laws. The Commissioners concluded that impediments to settlement were far more serious than the supposed problems of collusion which defendants typically raise, and that contribution should not be allowed where settlements have been made:

> It seems more important not to discourage settlements than to make an attempt of doubtful effectiveness to prevent discrimination by plaintiffs, or collusion in the suit.

See Commissioners' Comment § 4(b). The Commissioners concluded that the former rule allowing contribution against settlors made settlements impossible and, furthermore, accomplished nothing in preventing collusion. *Id.* Therefore, the revised Uniform Contribution Among Tortfeasors Act, even while allowing contribution in some cases,[15] specifically dis-

[15] As noted above, even the U.C.T.A. does not allow contribution where intentional conduct is involved. § 1(c).

allows contribution against defendants who have settled in good faith. U.C.T.A. § 4(b). If contribution were adopted, it should not apply where good-faith settlements have been reached.[16]

III. THE NO-CONTRIBUTION RULE IS FAIR

A. There Was No Coercion, Intimidation or "Settlement Stampede" in M.D.L. 310

In their *amicus* briefs, the M.D.L. 310 defendants supporting contribution spin out a tale of alleged abuse, coercion, blackmail and visions of a Texas-style stampede by the defendants to pay millions of dollars to the Corrugated Class in settlement, even though they claim that none of them was guilty of any wrongdoing. Mead's *amicus* brief is a compendium of every known epithet and pejorative to debase class actions as a procedural device. The villain in this piece is a combination of the class action under Rule 23 and the long-standing rule against contribution and claim reduction in anti-trust litigation. The problem with this supposed horror story in M.D.L. 310 is that it bears little resemblance to the truth.

First, there was no coercion or intimidation and no settlement stampede in M.D.L. 310. It is true that after the class was certified by the district court, the M.D.L. 310 defendants' interest in settlement quickened. By this time Class counsel had begun to examine the hundreds of thousands of documents produced by the defendants to the grand jury in the criminal

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[16] There is no reason to apply contribution to class actions as a means of preventing collusion because Rule 23 of the Federal Rules of Civil Procedure, which requires court approval of all settlements, guarantees that in class actions *all* settlements are made in good faith. Certain *amici's* claims of "sweetheart deals" and "extortionate settlements" are pure fiction, for the district court is charged with the responsibility of insuring that all class action settlements are fair and reasonable under Rule 23(e). Therefore, class action settlements, once approved by the district court, should automatically preclude contribution claims.

proceeding, and it became clear that the corrugated container industry for many years was infected by widespread price fixing. Thus the M.D.L. 310 defendants were anxious to settle, not because of any coercion but because they legitimately feared that if they went to trial they, like Mead, would be found guilty of conspiring to fix prices.

Second, the settlements in M.D.L. 310 can hardly be described as sweetheart deals as the defendants there paid more than $300 million to settle the Class' claims. Each defendant's situation was analyzed according to its particular facts and circumstances before any settlement was reached. The Class was aware early in the case that the defendants were of varying degrees of guilt and varying solvencies. In addition, there were very different quanta of admissible evidence available against each defendant. As discovery proceeded, the Class' expectation of success at trial increased with respect to most defendants and decreased with respect to a few. Some defendants presented economic hardship cases, and that factor bore heavily on the size and timing of the settlement with those defendants.[17]

Moreover, because M.D.L. 310 was a class action, as each settlement was reached, the Class presented it to the district court for approval pursuant to Rule 23. As required by that Rule, each settlement was closely scrutinized by the district court for its fairness, reasonableness and adequacy. The motions seeking approval of the settlements were supported by substantial evidentiary material, economic data compiled by

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[17] Not desiring to cripple small independent firms competing in the corrugated industry, the Class agreed to settle with Consolidated Packaging Corp. and Interstate Container Corp., M.D.L. 310 defendants in demonstrable financial difficulty, at greatly reduced figures. These hardship defendants also cooperated with the Class in providing information about the workings of the conspiracy. Mead and other M.D.L. 310 *amici* have conspicuously omitted any reference to these hardship settlements in their briefs.

expert witnesses and a detailed description of the negotiations leading to each settlement. All settlements except for Westvaco, which settled during trial, expressly stated that each settling defendant's sales would remain in the lawsuit, and that by settling with certain defendants, the Class was not waiving its claims against any other, non-settling, defendant. For each defendant, the district court concluded that the settlement had been reached through arms-length negotiation and was fair, adequate and reasonable.

Finally, M.D.L. 310 did not involve any hint of collusion or "sweetheart deals," and there can be no allegation that the plaintiff Class failed to sue any conspirators out of whim, fear or spite. M.D.L. 310 presented a typical horizontal price-fixing scheme, where dozens of manufacturers of corrugated products exchanged current price information and agreed to maintain or raise prices to their customers. It is highly significant that 7 of the 20 M.D.L. 310 defendants found by the jury to have conspired to fix prices with Mead were not indicted in 1977 by the grand jury. Each of those unindicted defendants paid varying but substantial sums in settlement of the class claims against them. The price-fixing engaged in by the defendants in M.D.L. 310 was the same type of blatant price-fixing in the sister folding cartons industry which was fully exposed by the court in *United States* v. *Consolidated Packaging Corp.*, 575 F. 2d 117 (7th Cir. 1978). M.D.L. 310, like *Consolidated Packaging*, is a classic price-fixing case.

Mead alone of the M.D.L. 310 defendants chose to take its case to a jury, which returned a verdict of guilty against Mead for conspiring to fix prices with 20 other M.D.L. 310 defendants. No one coerced or intimidated any innocent M.D.L. 310 defendant to settle with the Class. No rational business manager will pay substantial sums in settlement of claims believed to be groundless. Such conduct violates the basic cost-benefit analysis that governs the decision-making process in any business. Experience over the years has shown that in case after

case, defendants convinced of their innocence but faced with substantial potential liability in antitrust class actions have had those actions dismissed for want of legal sufficiency or tried those cases to fact-finders who found them innocent of wrongdoing.[18]

B. The No-Contribution Rule Is Fair, Particularly in Actions Brought Under Rule 23

The protestations of unfairness by certain Corrugated defendants simply do not withstand scrutiny. First, there was no "unfairness" to the Corrugated companies at the critical time at which they made their decisions to fix prices. Each company had the ability from this *ex ante* position to weigh the benefit it would receive from expected illegal gains against the likelihood that it would be convicted and held responsible for the full treble damages caused by the conspiracy. *See Easterbrook, Landes & Posner* at 342-44. If those damages were sufficiently unattractive, each company should have steered clear of anti-competitive conduct. Having decided to participate in the conspiracy, no defendant should be heard to complain or allowed to change the rules simply because it was caught.

Furthermore, there was no unfairness at the time that each defendant's settlement decision was made. In M.D.L. 310, unlike the *Texas Industries* and *Bowman's, Inc.*, cases, no major co-conspirators were omitted from suit. Even after suit was filed, no single conspirator was more likely than another to be called upon to pay the damages of the conspiracy. In addition, each settlement in M.D.L. 310 was scrutinized by the district

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[18] *See, e.g., In re Auto Fleet Antitrust Litigation,* M.D.L. 65 (N.D.Ill.) (national class action for price fixing against General Motors Corp., Ford Motor Co., and Chrysler Corp.; defendants found not liable after bench trial); *In re Nissan Antitrust Litigation,* 577 F. 2d. 910 (5th Cir. 1978) (national class action for price fixing against Nissan and dealers; defendants found not liable after jury trial); *In re Fine Paper Antitrust Litigation,* M.D.L. 323 (E.D. Pa. 1980) (state class action for price fixing against fine paper manufacturers; defendants found not liable after jury trial); *Phillips* v. *Chicago Mercantile Exchange,* No. 70 C 1216 (N.D. Ill. 1978) (national class of futures contract purchasers; defendants found not liable after jury trial).

court pursuant to Rule 23, as discussed above, n. 16, and could not have been approved if it were unfair or collusive.[19]

When all prominent conspirators have been sued, there is no unfairness when viewed *either ex ante* or *ex post*. As commentators have concluded, "the case for a contribution rule as a means of preventing unfairness is unpersuasive." *Easterbrook, Landes & Posner* at 344.

The plea for "fairness" to antitrust conspirators is nothing but a plea for leniency and for an end to joint and several liability. The M.D.L. 310 *amici* who favor contribution really seek to limit their exposure to only a small fraction of the damage caused by the conspiracy. To fashion a "fairer" system, in their scheme, would completely dilute these very sanctions which were carefully built into the antitrust laws by Congress. These *amici* are confusing strictness, which is essential to deal with the type of conduct in which they have engaged, with unfairness. There is no unfairness in a strict but clear rule which insures that conspirators will pay for all the harm done by any conspiracy in which they choose to participate, and which says that once they have chosen to conspire, any one of them may be held responsible for the damages caused by all.

Commentators have observed that complaints of unfairness largely result from the doctrine of joint and several liability, and to the extent that this doctrine is desirable in antitrust cases, the argument of unfairness carries less weight. *See, e.g., Leon* at 817. Every conspirator must be held liable for all damage caused until that conspirator takes sufficient steps to extricate itself from the conspiracy. Because each conspirator is regarded as a vital link in the combination which causes all the

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[19] The requirement of district court approval of class settlements insures that there will be no collusive settlements. Therefore, the reasoning of cases like *Judson* v. *Peoples Bank & Trust Co.*, 17 N.J. 67, 110 A. 2d 24 (1954), where the court's decision was based largely on the interest in preventing collusion between the plaintiff and certain of the defendants, has no application here.

damages, *see, e.g., Baughman* v. *Cooper-Jarrett, Inc.*, 391 F. Supp. 671, 678 (W.D. Pa. 1975); *Riss & Company, Inc.* v. *Association of American Railroads*, 170 F. Supp. 354, 370 (D.D.C. 1959), the rule of joint and several liability is fair and necessary in such cases. If lesser sanctions are imposed, conspiracies will not be deterred.

Even if there were some form of "fairness" that would be enhanced by contribution, that fairness would work to the advantage of intentional wrongdoers at the expense of their victims. The severe problems which would result with respect to management and settlement of antitrust cases should not be tolerated when the benefits would accrue only to price-fixers whose illegal conduct should have been deterred in the first place. The purpose of the antitrust laws is not to provide leniency to the perpetrators of conspiracies at the expense of their victims.

IV. THE PROPORTIONAL CLAIM REDUCTION PROPOSED BY CERTAIN *AMICI* IS IMPROPER

Although the case now before the Court involved no settlement, certain *amici* would have this Court go beyond a decision on the propriety of contribution to deprive plaintiffs of a portion of the damages specifically provided by the antitrust statutes under the guise of "claim reduction." Because this question is not presented by the case now actually before the Court and because the issues, policies and factors relating to claim reduction are so complex, resolution is best left to a case which squarely presents the issue.

Should this Court feel compelled to reach the issue of claim reduction at this time, however, this *amicus* respectfully suggests that adopting the form of proportional claim reduction proposed by certain Corrugated defendant *amici* violates the fundamental purposes of the antitrust statutes and would render multi-defendant antitrust actions totally unworkable.

Not only would the deterrent purpose of the antitrust statutes be eroded by claim reduction as much as, or more than, a rule of contribution, but claim reduction has the additional evil of totally emasculating the primary goal of full statutory compensation for victims. Claim reduction is, in essence, contribution from victimized plaintiffs, whom the statutes are specifically designed to protect, rather than from equally culpable defendants, against whom the statute is focused. Furthermore, as described in detail below, a rule of claim reduction would make antitrust actions, and particularly class actions, tremendously difficult to litigate and often impossible to settle, even where settlement is supported by *every* relevant factor.

Finally, it should be noted that a *fair* form of claim reduction is already in effect in antitrust cases. *Baughman* v. *Cooper-Jarrett, Inc.*, 530 F. 2d 529, 533-35 (3d Cir. 1976); *Flintkote Co.* v. *Lysfjord*, 246 F. 2d 368, 397-98 (9th Cir. 1957). Under "*pro tanto*" claim reduction, the plaintiff's total claim is always reduced by the actual amount previously received in settlement, to avoid permitting any recovery in excess of actual prescribed damages.[20] In antitrust actions, *pro tanto* claim reduction has the salutary effect of permitting full compensation in the amount of the damages (trebled) as specifically provided by Congress while preventing duplicative recovery; it preserves the fair, time-honored and effective congressional mandate on damages which the form of claim reduction proposed by certain *amici* would eliminate.[21]

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[20] *See Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U. S. 321, 328 (1971); *Aro Mfg. Co.* v. *Convertible Top Replacement Co.*, 377 U. S. 476, 512-13 (1964).

[21] If a new rule of proportional claim reduction were created, it should be given purely prospective application under the test enunciated in *Chevron Oil Co.* v. *Huson*, 404 U. S. 97 (1971); *see also Linkletter* v. *Walker*, 381 U. S. 618 (1965); *England* v. *Louisiana State Board of Medical Examiners*, 375 U. S. 411 (1964); *Great Northern Ry. Co.* v. *Sunburst Oil & Pipeline Co.*, 287 U. S. 358 (1932).

(Footnote continued on following page.)

A. Claim Reduction Need Not and Should Not Be Decided at This Time

Remarkably, petitioner Texas Industries argues for *pro rata* claim reduction even though settlement is not an issue in its case before this Court. As no settlement was involved, there was no question of claim reduction ruled on by the Fifth Circuit in that case.[22] Even if contribution were allowed, this would not be an appropriate occasion for this Court to consider claim reduction. Claim reduction is only one of many possible ways of allocating contribution damages, and it raises numerous complex issues which are discussed here only to the extent of the limited space available. The entire issue would best be addressed in a case which squarely raises the issue, which this case does not.

B. The Existing, *Pro Tanto* Claim Reduction Rule Alone Comports with the Statutory Framework of the Antitrust Laws and Should Not Be Altered by the Courts

As noted above, *pro tanto* claim reduction has always been applied by federal courts in antitrust cases in which settlements have been reached with some, but not all, defendants. *Pro*

(Footnote continued from preceding page.)

Proportional claim reduction would overturn an 80-year precedent of confining claim reduction to the *pro tanto* amount received, and it would frustrate the statute's compensatory goals without furthering any of its deterrent purposes. The sole benefits would accrue either to Mead, which was found guilty, or to the settling defendants, who expressly bargained that their sales would *not* be removed from the lawsuit. Retroactive application of such a new rule would cause a severe and substantial hardship to the M.D.L. 310 Class, which settled in reliance on the established law, and which expressly reserved the settlors' market shares. As a matter of equitable doctrine, the well-established right which the class retained should not be taken from them by retroactive application of a new rule.

[22] Even in M.D.L. 310 there has never been a final ruling by the district court on claim reduction, and the Court of Appeals for the Fifth Circuit therefore dismissed the appeal on claim reduction for lack of jurisdiction. *In re Corrugated Container Antitrust Litigation*, No. 79-2439 (5th Cir. Oct. 30, 1979).

tanto claim reduction alone is also in effect in 26 of the states which allow contribution.[23] Only 7 states permit any form of proportional claim reduction. *Pro tanto* reduction is also incorporated in the Uniform Contribution Among Tortfeasors Act[24] and has even been applied by many courts in connection with securities law violations, where contribution is authorized by statute. *See, e.g., MacKethan* v. *Burrus, Cootes & Burrus,* 545 F. 2d 1388 (4th Cir. 1976); *Herzfeld* v. *Laventhal, Krekstein, Horwath & Horwath,* 540 F. 2d 27 (2d Cir. 1976).

Pro tanto claim reduction is fair to all parties, does not discourage settlements, and fulfills the statutory purpose of providing the injured party with a complete recovery. This

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[23] *Pro tanto* claim reduction is in effect in the following states: Alaska, *Arctic Structures, Inc.* v. *Wedmore,* 605 P. 2d 426 (Alas. 1979); California, *American Motorcycle Assoc.* v. *Superior Court of L.A.,* 578 P. 2d 899 (Cal. 1978); Colorado, Col. Rev. Stat. Tit. 13, Art. 50.5-105(a); Delaware, Del. Code Ann. Tit. 10 § 6304(a); Florida, F. S. A. § 768.31(5)(a); Hawaii, Haw. Rev. Stat. § 663-24; Idaho, Idaho Code § 6-805; Illinois, Ill. Rev. Stat. ch. 70 § 302(c); Maryland, *Maryland Lumber Co.* v. *White,* 107 A. 2d 73 (Md. 1954); Massachusetts, Ann. Laws Mass. ch. 231B § 4(a); Missouri, Vernon's Ann. Mo. Stat. § 537.060; Nevada, N. R. S. § 17.245 (2); New Hampshire, N.H. Rev. Stat. Ann. § 507;7-b; New Mexico, N.M. Stat. Ann. § 41-3-4; North Carolina, N.C. Gen. Stat. § 1B-4(1); North Dakota, N.D. Cent. Code § 32-38-04(1); Ohio, Ohio Stat. Ann. § 2307.32(f)(1); Oregon, Ore. Code ch. 18.455(a); Pennsylvania, P.S. § 2085; Rhode Island, R.I. Gen. Laws § 10-6-7; South Dakota, S.D. Comp. Laws § 15-8-17; Tennessee, Tenn. Code Ann. § 23-3105(b); Utah, Utah Code Ann. § 78-27-42; West Virginia, *Tennant* v. *Craig,* 195 S. E. 2d 727 (W.Va. App. 1973); Wyoming, Wy. Stat. Ann. § 1-1-113(a)(i).

[24] The U.C.T.A. provides: "[A good faith settlement or release] reduces the claim against the others [non-settling defendants] to the extent of any amount stipulated by the release . . . or *or in the amount of the consideration paid for it,* whichever is the greater." (emphasis added) § 4(a). Even the earlier version of the Act, which permitted contribution against settling defendants, did not deprive plaintiffs of the ability to pursue the remainder of their claim against any non-settling defendants.

form of claim reduction is especially fair in class action cases, where collusion is prevented by the requirement under Rule 23 that all settlements be approved by the court. *See* Fischer, *Contribution in 10b-5 Actions*, 33 Bus. Law. 1821, 1832-35 (1978).

Furthermore, the *pro tanto* form of claim reduction was endorsed by Congress in the Antitrust Improvement Act of 1976, 15 U. S. C. 15(c), which specifically provides that damages determined in attorney general actions shall be reduced by the amounts received from other sources. Thus, the antitrust statutes reflect a congressional intent to guarantee a full trebled recovery. *Pro tanto* claim reduction, already in effect, accomplishes this end and is fair, because it gives non-settling defendants credit for partial settlements received without rewarding them for their refusal to settle nor permitting multiple recovery. This long-established but limited form of claim reduction, both relied upon and expressed by Congress in the provisions for treble damages and the limitation on reduction of recoverable amounts, is even less suited for alteration by the Court than is contribution for all of the reasons discussed at pages 6-10, *supra*.

C. The Proportional Claim Reduction Proposed By Certain *Amici* Would Violate the Intention Of Congress to Fully Compensate Victims Of Antitrust Violations

The form of claim reduction proposed by defendants under the guise of "fairness" is particularly insidious and of vastly greater harm than any rule of contribution. Contribution from other defendants decreases deterrence, but at least it fully compensates the plaintiffs. Claim reduction has the additional evil of diminishing plaintiffs' recovery to less than the remedy expressly prescribed by statute. Claim reduction is really a form of contribution from the innocent plaintiffs rather than, like contribution, merely an allocation among admittedly guilty defendants. Claim reduction would thus defeat a primary

purpose of the antitrust statutes: compensation of victims. *Pfizer, Inc.* v. *Government of India*, 434 U. S. 308, 314 (1978); *Illinois Brick Co.* v. *State of Illinois*, 431 U. S. 720, 746 (1977).

Under a proportional claim reduction scheme, plaintiffs could never recover their full damages if they settled with any defendant. Because settlements are based on compromise, no defendant would ever be expected to settle for its full "share" of the conspiracy damages. Nonetheless, under the proposed scheme, as a result of settling with any defendant, the plaintiffs would be releasing that defendant's "share" of the damages. Certainly if contribution were allowed in antitrust cases, it should not be coupled with a rule that would in essence take the contributive share from the victim and credit it to the benefit of the co-conspirator.[25]

D. Proportional Claim Reduction Would Make Settlements Impossible and Render Antitrust Cases Extremely Complex

Claim reduction would drastically alter and interfere with the strong policies favoring settlement of controversies. *See, e.g., Cotton* v. *Hinton*, 559 F. 2d 1326, 1331 (5th Cir. 1977); *Florida Trailer and Equipment Co.* v. *Deal*, 284 F. 2d 567, 571 (5th Cir. 1960). First, claim reduction restricts settlement by ignoring certain key considerations intrinsic to plaintiffs' evaluations of settlement, including salient factors such as the likelihood, difficulty or cost of proving liability; the existence of class certification; the stage of the proceedings; and the solvency of the particular defendant.

Furthermore, the mechanics of claim reduction may not even permit true "peace." The result of this too blunt approach is to deter or prohibit settlements with fewer than all of the defendants. Any form of claim reduction other than the *pro tanto* method already in effect would lead to the inevitable result that a plaintiff who was confident of prevailing against at least one defendant at trial *would never settle with any defendant at all. See Leon*, at 819; *see also* Sellers, *Contribution in Antitrust Damage Actions*, 24 Vill. L. Rev. 829, 863 (1979).

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[25] Although claim reduction has been presented by *amici* as an equitable principle, it is sought by parties with unclean hands, namely those who are actually found at trial to have engaged in a conspiracy in violation of the antitrust laws.

Claim reduction will also inhibit settlements because it prevents settlements at lesser amounts with defendants against whom admissible proof may be sparse. If the Court creates a rule of proportional claim reduction, a plaintiff could not settle inexpensively with such a defendant without waiving a much greater portion of its damages, nor could the court approve such a settlement under Rule 23. It is often in the best interest of both the plaintiff and such a defendant to settle for a smaller amount than the plaintiff would demand from a defendant, like Mead, whose guilt is easier to prove at trial.[26]

Furthermore, the only form of proportional claim reduction which would allow settlements with defendants against whom there is less proof, requiring proof of the actual culpability of the settlors, would create other manageability problems. First, the court would face the absurdity of a plaintiff attempting to prove non-liability of each settlor, while the non-settling defendants attempted to prove each settlor's complicity in the

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[26] It is ironic that so many *amici* argue the plight of the supposedly less culpable defendants like Green Bay Packaging, while simultaneously arguing for claim reduction, for it is clear that if proportional claim reduction were the rule, the class could not possibly have settled for reduced amounts with Green Bay or any other defendant against whom there is less inculpatory evidence. The least meritorious claims would thereby be forced to remain before the already overburdened court.

It should also be noted that certain *amici* are less than candid when they discuss the supposed innocence of Green Bay. While *admissible* evidence against this defendant was scarce, there was sufficient inculpatory evidence to induce the Justice Department to identify *eleven* Green Bay employees as co-conspirators in the letter of J. Albert Kroemer, July 21, 1978, filed as a bill of particulars in the criminal case in the corrugated industry. Furthermore, the fact that Green Bay was not found to have conspired with *Mead* to fix prices does not mean that Green Bay did not conspire with other defendant companies. Only Mead chose to go to trial in M.D.L. 310 and only the identity of *its* co-conspirators was presented to the jury for deliberation.

conspiracy. *See Leon* at 819. As a consequence, all defendants would be actively involved in the case through trial. This would not only make the case extremely unmanageable, but would itself discourage settlements because the would-be settlors would receive no peace.

A second drawback of claim reduction is that it prevents beneficial "hardship" settlements. For example, plaintiff may decide to settle for reduced amounts with a particular defendant which is financially weaker than its co-conspirators, as was actually done in M.D.L. 310 with Interstate Packaging Corp. and Consolidated Packaging Corp. Such settlements are beyond reproach because a full judgment would not be collectible and because further litigation and judgment could bankrupt the defendant and actually injure competition. Nonetheless, by their version of claim reduction, defendants seek a better result than they would receive even if contribution were allowed, because a right of contribution against an insolvent co-defendant would be worthless; defendants are in essence asking the plaintiffs to bear the loss attributable to insolvent defendants. Because the plaintiffs could not prevent the loss of a significant portion of damages for a hardship settlement if proportional claim reduction were in force, they would be prevented from settling.

It should also be noted that in the context of a class action, a claim reduction rule simply may not permit settlement. Rule 23(e) of the Federal Rules of Civil Procedure requires that the court approve any settlement. If a settlement will trigger a claim reduction which is greater than the amount of the benefit to be received by plaintiff in settlement, the court might be abusing its discretion in approving the settlement.[27] *See, e.g.,*

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[27] This situation would exist under any of the assumptions and arguments used in this section of the brief. For example, if liability of the settlors were assumed rather than proven, a low settlement with a defendant against whom there are problems of proof would trigger a

(Footnote continued on following page.)

Wainwright v. *Kraftco*, 58 F.R.D. 9, 12 (N.D. Ga. 1973) (settlement approved in part because plaintiffs could obtain remainder of their total damage from other defendants). In such a situation, it would be wiser to keep a defendant in the lawsuit and refuse to settle because of the greater financial strength or clearer liability of the other defendants.

Claim reduction is thus not the panacea of either simplicity or fairness, as certain *Corrugated* defendants have asserted. Claim reduction is plainly unacceptable and should be soundly rejected.

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claim reduction far greater than plaintiff had determined to be the value of the claim against that defendant. Similarly, where proof is costly or collectibility questionable, plaintiff's valuation of the expected recovery will necessarily be less than the claim reduction amount regardless of whether the claim reduction is based on *pro rata* or some other method and regardless of whether the liability of the settling defendants is presumed or proven.

Conclusion

For all of the foregoing reasons, the rule disallowing contribution in antitrust cases should not be changed and the novel rule of proportional claim reduction should not be substituted for the traditional rule of *pro tanto* claim reduction in antitrust cases.

Dated: January 16, 1981

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No. 79-1144

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

TEXAS INDUSTRIES, INC.,

Petitioner,

v.

RADCLIFF MATERIALS, INC., JIMCO, INC. and OKC DREDGING, INC.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF *AMICUS CURIAE* CPC INTERNATIONAL INC. IN SUPPORT OF PETITIONER TEXAS INDUSTRIES, INC.

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TABLE OF CONTENTS

PAGE

Interest of the *Amicus Curiae* 1

Argument 3

I. Contribution in Antitrust Cases Would Avoid the Arbitrary Allocation of Treble-Damage Liability and Is Consistent With Congressional Purpose 3

II. Contribution in Antitrust Cases Would Prevent Abuse of the Settlement Process 8

Conclusion 11

Table of Authorities

Cases:

Cooper Stevedoring Co. v. *Fritz Kopke, Inc.*, 417 U.S. 106 (1974) 4

Coopers & Lybrand v. *Livesay*, 437 U.S. 463 (1978) 8-9

In re Corrugated Container Antitrust Litigation, 84 F.R.D. 40 (S.D. Tex. 1979) 9

Hawaii v. *Standard Oil Co.*, 405 U.S. 251 (1972) 3

United States v. *Reliable Transfer Co.*, 421 U.S. 397 (1975) 6

United States v. *United Gypsum Co.*, 438 U.S. 422 (1978) 6

PAGE

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Brief for *Amicus Curiae* Mead Corp., *Westvaco Corp.* v. *Adams Extract Co.*, 49 U.S.L.W. 3288 (U.S. Oct. 20, 1980) (No. 79-972) 9n

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Note, *Contribution and Antitrust Policy*, 78 Mich. L. Rev. 890 (1980) 9

Remarks of Rep. Rodino, 120 Cong. Rec. 36388 (1974) .. 5

S. Rep. No. 428, 96th Cong., 1st Sess. (1979) 9

Wall Street Journal

Nov. 11, 1975, p. 4. col. 2 ..... 8n
July 31, 1978, p. 4, col. 2 ..... 8n
Nov. 14, 1978, p. 14, col. 3 ..... 8n
Nov. 24, 1978, p. 8, col. 4 ..... 8n
Apr. 10, 1979, p. 18, col. 2 ..... 8n
May 1, 1979, p. 4, col. 2 ..... 8n
May 2, 1979, p. 21, col. 1 ..... 8n
May 21, 1979, p. 37, col. 4 ..... 8n
July 24, 1979, p. 33, col. 3 ..... 8n
Sept. 14, 1979, p. 21, col. 1 ..... 8n
Sept. 20, 1979, p. 32, col. 3 ..... 8n
Aug. 18, 1980, p. 6, col. 4 ..... 8n
Sept. 19, 1980, p. 34, col. 1 ..... 8n
Sept. 29, 1980, p. 50, col. 4 ..... 8n

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BRIEF OF *AMICUS CURIAE* CPC INTERNATIONAL INC. IN SUPPORT OF PETITIONER TEXAS INDUSTRIES, INC.

On consent of all parties, CPC International Inc. ("CPC") submits this brief as *amicus curiae* in support of Petitioner's position that a right of contribution does or should exist among co-defendants in Federal antitrust cases.

Interest of *Amicus Curiae*

CPC manufactures and sells a wide variety of products, including a number derived from corn. It is a defendant, along with others, in over 30 antitrust "class" actions charging collusive pricing among manufacturers of corn derivatives. These actions have been consolidated for pre-trial purposes as *In re Corn Derivatives Antitrust Litigation,* MDL Docket No. 414, D.N.J. Misc. No. 80-59.

In the past, CPC also refined sugar, and was a defendant with others in antitrust class actions charging collusive pricing among Eastern sugar refiners. CPC settled the claims made against it in the sugar class actions by payment of approximately $9 million into a settlement fund totaling $25,323,000. As has been the fate of many another defendant in an industry-wide class action, CPC agreed to pay such a substantial amount in settlement because the enormity of the contingent liability at issue—there estimated at $900 million—made it imprudent to risk trial on the strength of CPC's judgment that the evidence did not warrant a verdict against it. This overwhelming pressure to settle was attributable not only to the statutory trebling of actual damages and the class action device; it was also attributable in large part to the uncertainty of legal procedures for equitably allocating damages among antitrust defendants.

Absent such allocation, plaintiffs in industry-wide cases are free to make early "sweetheart" settlements with defendants of their choice, thus raising a "war chest" which assures the payment of legal fees regardless of the outcome, and leaving the remaining defendants with *increased* damage exposure based on the sales of the entire industry. The amount at risk for these defendants is then out of proportion to their own sales. To illustrate, CPC's share of Eastern sugar industry sales was only 7%, but its share of settlement payments was roughly 28%.

CPC's experience is not unusual. More often than not, one or more defendants in industry-wide suits are forced to choose between disproportionate damage exposure and a disproportionate settlement. For the reasons stated below, CPC believes that recognizing the right to contribution would help bring about greater fairness in both adjudicated and settled antitrust litigation.

ARGUMENT

I.

Contribution in Antitrust Cases Would Avoid the Arbitrary Allocation of Treble-Damage Liability and Is Consistent With Congressional Purpose.

In establishing "private attorneys general" to enforce the antitrust law, *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251, 262 (1972), Congress necessarily provided them with "prosecutorial discretion" to pursue certain defendants more vigorously than others in their own private interests. Quite naturally, they cannot be relied upon for even-handed enforcement. For example, in a multi-party conspiracy case, a plaintiff will often fund his case with an early settlement (perhaps even before the case is filed) with some of the alleged conspirators; then, as to the remainder, he may either

(a) obtain a judgment against all of them, but enforce it only against one (*e.g.*, for competitive reasons, or because it is easier to collect from one), or

(b) seek judgment against some but not others in return for favorable testimony or some other consideration.

These alternatives do not leave defendants fairly situated with respect to each other.

Assuming that all alleged co-conspirators are equally at fault, it is obviously unfair for some of them to leave the litigation relatively unscathed while others (perhaps only one other) must pay for those defendants' unlawful conduct. In practice, however, the prospect of achieving such an escape at the expense of a competitor (a commonplace

in cases alleging price-fixing) often tempts one or more defendants to enter deals with the plaintiff to the detriment of the other defendants.

On the assumption that some defendants are more culpable than others, a system which permits the more culpable defendants to shift their liability to those less culpable is even more unfair.

When a defendant has been subjected to a judgment for which another is equally liable, this Court has recognized that the common law's tendency to "leave the wrongdoer where it finds him" is not an adequate solution. In *Cooper Stevedoring Co.* v. *Fritz Kopke, Inc.*, 417 U.S. 106 (1974), the Court stated:

> "[A] 'more equal distribution of justice' can best be achieved by ameliorating the common-law rule against contribution which permits a plaintiff to force one of two wrongdoers to bear the entire loss, though the other may have been equally or more to blame. See *The Max Morris*, [137 U.S. 1 (1890)], at 14." 417 U.S. at 111.

A "more equal distribution of justice" would not be contrary to Congressional purpose in enacting the antitrust laws. The arguments used against contribution are theoretical at best, and lack empirical support. They generally fall under the headings of increasing deterrence and encouraging settlements.

(a) *Deterrence.* No persuasive reason was given by the Court of Appeals for its view that the prospect of being saddled with an unfairly disproportionate treble-damage judgment would have any additional deterrent effect on would-be violators beyond that which already exists. Indeed, it is most unlikely that it would. The criminal pro-

visions of the antitrust laws serve as powerful deterrents to knowing violation, particularly since the 1974 amendments, which tripled the maximum prison terms and further multiplied the fines that may be imposed (*see* 120 Cong. Rec. 36338-39 (1974), remarks of Rep. Rodino). Treble-damage exposure, and the prospect of class actions, probably also deter violations. No additional deterrence is needed or can be expected from a rule permitting plaintiffs to manipulate the impact of trebled damages so that it falls more heavily on defendants of their choice.

To put the matter concretely: many corporations (including CPC) follow a program of educating employees about the antitrust laws. Employees are told of the criminal penalties applicable to them individually, the danger of substantial monetary loss to the corporation from both government and private suits, and the risk of jeopardizing their employment if they take action causing the corporation to be subjected to such a loss. If, despite such warnings, an executive is prepared to knowingly violate the law, risking personal fines, imprisonment, and loss of future employment, it defies reason to suppose that he would be deterred from the violation if his employer's possible loss included disproportionate as well as treble damages.

Moreover, even if the possibility of disproportionate liability would deter violations, a contribution rule could permit disproportionate liability where the circumstances warrant (*e.g.*, on the organizer and ringleader of a conspiracy). In such a case, however, the disproportionate result would have been imposed judiciously by a court instead of accidentally or as the result of the animosity of some of the parties working against the others. Putting that power to impose sanctions in judicial hands is especially appropriate because of the dangers of over-deterrence recently noted by this Court:

> "salutary and pro-competitive conduct lying close to the borderline of impermissible conduct might be shunned by businessmen who chose to be excessively cautious in the face of uncertainty regarding possible exposure to criminal punishment for even a good-faith error of judgment." *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 441 (1978) (footnote omitted).

(b) *Settlement.* While it is argued that contribution might impede settlement, it would seem more likely to stimulate fairer settlements. The issues on this point are similar to those posed in *United States* v. *Reliable Transfer Co.*, 421 U.S. 397 (1975), where the Court ruled that damages in admiralty cases are to be equitably apportioned. With respect to the argument that the old rule enabled quick settlements, the Court stated:

> "at bottom, it asks us to continue the operation of an archaic rule because its facile application out of court yields quick, though inequitable, settlements, and relieves the courts of some litigation. Congestion in the courts cannot justify a legal rule that produces unjust results in litigation simply to encourage speedy out of court accommodations."
>
> "Experience with comparative negligence in the personal injury area teaches that a rule of fairness in court will produce fair out-of-court settlements." 421 U.S. at 408 (footnote omitted).

Further, a contribution rule in antitrust cases would not prevent an early settlement by a fringe defendant for a small sum. He could do this without further involvement if the plaintiff would agree to either (a) "take his sales out of the case" by not seeking to collect on them from the

other defendants, or (b) hold him harmless against a further assessment—a common arrangement in federal securities law cases, where the right of contribution has been recognized. Alternatively, the settling defendant might bargain with the other defendants to obtain a waiver of their right of contribution or, if the court were willing, secure an advance ruling that his payment would discharge his burden. At worst, the remaining defendants could later proceed against the fringe defendant for any excess required to make up his equitable contribution to the total cost of disposition. This works no unfairness on the fringe defendant; it merely assures that he will bear his fair share of the load.[1]

Admittedly, however, clarifying the right to contribution would affect the settlement of antitrust cases. The manner in which it would do so is indicated below.

[1] The enormous expenses generated by protracted antitrust litigation may provide the fringe defendant with sufficient incentive to settle early, regardless of the possibility of additional contribution at some point in the future.

II.

Contribution in Antitrust Cases Would Prevent Abuse of the Settlement Process.

It is a matter for judicial notice that the settlement of multiple-defendant industry-wide class action cases is a multi-million dollar and growing enterprise. A sampling of recent settlements as reported in the *Wall Street Journal*[2] is set out below:

Industry	Amount	Year
Sugar Refining, Eastern and Western	$42,900,000	1975-1979
Cardboard Box	298,100,000	1979
Folding Cartons	210,000,000	1979
Water Heaters	13,650,000	1979
Cement	22,150,000	1980
Fine Papers	51,000,000	1980

When such large amounts of money are at stake, class action plaintiffs are well aware that defendants are under considerable pressure to settle rather than risk trial. As the Court observed in *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463 (1978),

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[2] Nov. 11, 1975, p. 4, col. 2; July 31, 1978, p. 4, col. 2; Nov. 14, 1978, p. 14, col. 3; Nov. 24, 1978, p. 8, col. 4; Apr. 10, 1979, p. 18, col. 2; May 1, 1979, p. 4, col. 2 (sugar industry articles). May 2, 1979, p. 21, col. 1 (cardboard box industry). Sept. 14, 1979, p. 21, col. 1 (folding carton industry). May 21, 1979, p. 37, col. 4; July 24, 1979, p. 33, col. 3; Sept. 20, 1979, p. 32, col. 3 (water heater industry). Aug. 18, 1980, p. 6, col. 4; Sept. 19, 1980, p. 34, col. 1 (cement industry). Sept. 29, 1980, p. 50, col. 4 (fine paper industry). The amounts reported, in the one industry in which CPC was involved, understate those actually paid.

> "Certification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense." 437 U.S. at 476.

In these circumstances, the absence of a contribution rule makes it possible for class action plaintiffs to exact increasing settlement premiums from the last defendants to settle, whether because plaintiffs "targeted" them for such exactions from the beginning, or because they felt they could not make a reasonable assessment of the merits of plaintiffs' claims at the earlier stage.

Early partial settlements may be in any amount which the court may consider as fair to the class, and in practice they receive little scrutiny. It has become common procedure for class action plaintiffs to obtain financing by partial settlements and progressively raise the amount for later settlements to reflect the enhanced exposure of each remaining defendant as settlements occur. Plaintiffs are thus in a position to impose arbitrary and increasingly unfair penalties on the remaining defendants.[3] This "whipsawing" has been criticized by a Congressional committee as "unfair", S. Rep. No. 428, 96th Cong., 1st Sess. 14-15 (1979), by a district court as "inherently coercive", *In re Corrugated Container Antitrust Litigation*, 84 F.R.D. 40, 41 (S.D. Tex. 1979), and by a law review commentator as producing "inequitable results", Note, *Contribution and Antitrust Policy*, 78 Mich. L. Rev. 890, 908 (1980).

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[3] A detailed statement of the method used in one such case is contained in the *amicus curiae* brief of Mead Corporation in No. 79-972. Settlements were negotiated on the basis of each defendant's percentage ("points") of total market share. The tabulation at page 10 of that brief indicates that one defendant paid *6.5 times* as much per point than a larger competitor which settled

Recognition of a right of contribution would act to prevent these presently-common abuses of the settlement process in several ways. Most importantly: It would permit innocent defendants to seek judicial vindication in cases in which they are now unwilling to take the risks of a ruinous verdict without any real possibility of contribution. In other words, contribution would provide an alternative to coerced capitulation in class action antitrust cases, similar to the alternative the law makes available in ordinary liti-

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a few months earlier—even though the premium-paying defendant was acquitted at the criminal trial.

Another illustration of this tactic can be found in an article reviewing the wallboard antitrust cases, co-authored by one of the attorneys on the plaintiffs' side. Furth and Burns, *The Anatomy of a Seventy Million Dollar Sherman Act Settlement—A Law Professor's Tape-Talk with Plaintiff's Trial Counsel,* 23 De Paul L. Rev. 865, 890 app. (1974). According to Furth and Burns at 890, among the three principles "foremost in the formulation of a settlement policy by liaison and class counsel" were "the notion that earlier defendants to settle would be given the opportunity to settle at a lower percentage of sales" and "the likelihood that settlement with one defendant would have a snowballing effect among others. . . ."

On June 29, 1973 one defendant accepted a settlement figure of $2,000,000 or approximately 7.5 per cent of its nationwide wallboard sales for 1966 and 1967. Prior to consummating this settlement, "plaintiffs advised all defendants that the price of settlement (as a percentage of sales) would increase with each successive settling defendant." Immediately after the first agreement, a second defendant agreed to settle at a figure of approximately 10 percent of its sales. Within a week, two more defendants surrendered at roughly sixteen percent of sales. One week and two settlements had multiplied the price of settlement. As Professor Burns put it:

> "Accordingly, plaintiffs' settlement strategy had produced a settlement fund of $22.5 million from four of the seven defendants. *These settlements placed enormous pressure on the two remaining major defendants.* . . ." Furth and Burns, supra, 23 De Paul L. Rev. at 890 app. (emphasis added).

Thus, by early August the two remaining major defendants were coerced into adding a combined figure of $45 million, thereby tripling the settlement pot.

gation. Because of the existence of this alternative, plaintiffs would not be in a position to extort discriminatory amounts from defendants by the machinations described above. Finally, recognition that disproportionate treatment might give rise to contribution proceedings among defendants would influence all parties to negotiate settlements of all claims at once—on terms likely to be approved by the Court as fair to both plaintiffs and defendants.

CONCLUSION

For the foregoing reasons, CPC International Inc. respectfully requests this Court to reverse the decision of the Court of Appeals for the Fifth Circuit and to remand to the district court with instructions to permit the assertion of claims to contribution.

Respectfully submitted,

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No. 79-1144

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

TEXAS INDUSTRIES, INC.,

Petitioner,

v.

RADCLIFF MATERIALS, INC., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF AMICI CURIAE THE DUPLAN CORPORATION AND OTHERS IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

PAGE

Interests of Amici Curiae 2

Summary of Argument 4

ARGUMENT—

I. Claim Reduction Is Not An Issue Before the Court and Should Not Be Decided In This Case 5

II. Claim Reduction Overturns Long Established Rules of Antitrust Law 8

A. Claim Reduction Is Prohibited by Section 4 of the Clayton Act and, If Adopted, Would Effectively Amend It 8

B. Claim Reduction Undermines the Concept of Joint and Several Liability 10

III. Considerations of Antitrust Policy Do Not Support Adoption of a Rule of Claim Reduction 12

A. The Coercive Effect of Large Multi-Defendant Antitrust Actions Does Not Require Adoption of a Rule of Claim Reduction 12

B. Claim Reduction Is Unfair 14

C. Claim Reduction Will Complicate Antitrust Litigation 16

D. Claim Reduction Will Discourage Settlements 18

E. Claim Reduction Will Undermine Deterrence 19

PAGE

IV. If This Court Adopts a Rule of Claim Reduction, It Should Not Apply the Rule Retroactively So As to Undermine Past Settlements 22

CONCLUSION 24

TABLE OF AUTHORITIES

Cases:

In re Ampicillin Antitrust Litigation, 1979-2 Trade Cas. (CCH) ¶ 62,936 (D.D.C. 1979) 23

Chevron Oil Co. v. *Huson*, 404 U.S. 97 (1971) 22

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The Duplan Corporation et al. v. *Deering Milliken Inc., et al.*, 444 F. Supp. 648 (D.S.C. 1977), *aff'd in part, rev'd in part*, 594 F.2d 979 (4th Cir. 1979), *cert. denied*, 444 U.S. 1015 (1980) 2, 3

Edmonds v. *Compagnie Generale Transatlantique*, 443 U.S. 256 (1979) 6

England v. *Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964) 22

Flintkote Co. v. *Lysfjord*, 246 F.2d 368 (9th Cir.), *cert. denied*, 355 U.S. 835 (1957) 5n., 9

Glus v. *G. C. Murphy Co.*, 629 F.2d 248 (3rd Cir. 1980) 7

Great Northern Ry. Co. v. *Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932) 22

PAGE

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Wainwright v. *Kraftco Corp.*, 58 F.R.D. 9 (N.D. Ga. 1973) 10

Washington v. *American Pipe & Construction Co.*, 280 F. Supp. 802 (S.D. Cal. 1968) 10

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Statutes and Rules:

Clayton Act § 4, 15 U.S.C. § 15 .....3, 4, 6, 8, 9, 10

Commentary:

Sullivan, *New Perspectives In Antitrust Litigation Towards a Right of Comparative Contribution*, 1980-2 U. Illinois Law F. 389 14

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BRIEF OF AMICI CURIAE THE DUPLAN CORPORATION AND OTHERS IN SUPPORT OF RESPONDENTS

The Duplan Corporation and others[1] submit this Brief as amici curiae in support of Respondents Radcliff Materials, Inc. et al.[2] The amici join with Respondents in opposing contribution, but primarily address and oppose the position of Petitioner and other amici who advocate adoption of a rule of claim reduction in antitrust cases.

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[1] The Duplan Corporation, Burlington Industries, Inc., Leon-Ferenbach, Inc., Madison Throwing Co., National Spinning Company, Inc., Texfi Industries, Inc.

[2] Counsel for Petitioners and Respondents have consented to the filing of this amicus curiae brief. Counsels' letters so consenting are on file with the Clerk of the United States Supreme Court.

Interests of Amici Curiae

The amici (hereinafter referred to as the "Throwsters")[3] are yarn producers who produce yarn by texturing synthetic filaments on texturing machines. The Throwsters are antitrust plaintiffs in an eleven-year old patent-antitrust action pending in the United States District Court for the District of South Carolina entitled *The Duplan Corporation et al.* v. *Deering Milliken Inc., et al.,* Consol C/A No. 71-306.

In that action, the Throwsters established, after a nine-month trial on liability issues, that the defendants and other co-conspirators had entered into an unlawful agreement to stabilize and maintain royalties on false twist texturing machines (which the Throwsters require for their texturing operations) and had unlawfully monopolized the United States market for those machines. 444 F. Supp. 648, 681-83 (D.S.C. 1977).[4] The United States Court of Appeals for the Fourth Circuit affirmed the District Court in all but one minor respect in a *per curiam* opinion reported at 594 F.2d 979 (4th Cir. 1979), and this Court denied defendants' petitions for writs of certiorari at 444 U.S. 1015 (1980).

Several months prior to the trial on amount of damage in the *Duplan* action, the defendants moved to amend their answer to assert an affirmative defense of claim reduction. That motion was granted by the District Court on August 4, 1980. Defendants seek, through their claim reduction defense, to extinguish more than one half of the dollar amount of the Throwsters' claims, which defendants contend is attributable to a co-conspirator with whom the

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[3] Yarn producers are referred to as "Throwsters" in the texturing industry.

[4] During the litigation, every one of the 22 patents initially asserted against the Throwsters were held invalid, not infringed or both.

Throwsters settled more than six years ago in reliance on then unquestioned law.

The trial on damage issues in *Duplan* was held before the Hon. Franklin T. Dupree from November 17, 1980 to December 5, 1980. At the trial the defendants vigorously asserted their claim reduction defense. The parties have concluded their post-trial filings in the case and are awaiting a decision from the Court.

This Court's decision in this case may determine the fate of the claim reduction defense in the *Duplan* litigation. The Petitioner here and a number of amici curiae urge this Court to adopt both a rule of contribution and a rule of claim reduction. If this Court adopts a rule of claim reduction, the Throwsters will lose more than 50% of the dollar value of their treble damage claim against the *Duplan* defendants, and suffer the total frustration of expectations upon which their six-year old settlement with one of the co-conspirators was based. The result for the Throwsters will be the loss of a major portion of the treble damage recovery to which they are entitled under section 4 of the Clayton Act, 15 U.S.C. § 15; a recovery which they have sought during more than eleven years of arduous, complex patent-antitrust litigation. Significantly, this result is sought by the *Duplan* defendants and will occur despite the apparent availability of a contribution claim against the settling defendant, if a rule permitting contribution is adopted here.

In view of the revolutionary impact of this prospect, the significance of a rule of claim reduction, as pointedly illustrated by the *Duplan* case, and the fact that the case before this Court does not raise such an issue, the Throwsters join in the Brief of Respondents and respectfully submit this brief which focuses, almost exclusively, on the claim reduction question.

Summary of Argument

The Throwsters submit that claim reduction is a separate and distinct concept from contribution which is not raised here and which, if considered at all, should be considered by Congress. If claim reduction is to be addressed by this Court, it should be adjudicated in an appropriate case which squarely raises the issue and permits full briefing and argument of the subject.

The Throwsters further submit that if, nevertheless, the claim reduction issue is examined in this case, it should be rejected as a rule in antitrust cases. Claim reduction would deprive plaintiffs of their right under section 4 of the Clayton Act to recover three times the damages they sustain as a result of an antitrust violation and would undermine the doctrine of joint and several liability. Furthermore, claim reduction will not meaningfully remedy the unfairness perceived by some in the current rule against contribution and claim reduction in antitrust cases.

Adoption of a right of claim reduction will, however, complicate antitrust litigation enormously by imposing a new set of claim reduction issues on antitrust cases. It will also create a potentially impassable barrier to settlement by creating unacceptable uncertainty in the minds of plaintiffs concerning the impact which a settlement will have on their remaining claims against non-settling defendants.

Claim reduction will also result in a dramatic reduction in deterrence. It will reduce both the risk that a wrongdoer will be forced to pay treble damages for the injury he caused and the prospect that he will be forced to pay a disproportionate share of the damages caused by the violation.

Finally, if this Court rejects these arguments and adopts a rule of claim reduction in antitrust cases, the rule should

not be applied to pre-existing settlements because it will result in substantial hardship to plaintiffs who entered into those settlements in good faith reliance on previously unquestioned law.

ARGUMENT

I.

Claim Reduction Is Not An Issue Before the Court and Should Not Be Decided In This Case.

Claim reduction is not raised by the facts of this case. Claim reduction, the elimination of that portion of a plaintiff's claim attributable (on whatever basis) to a settling defendant in a multiple defendant case, only becomes relevant where one or more defendants have settled and the others proceed to trial.[5] Here there is no settlement and consequently there is no need on the facts of this case to consider the claim reduction question.

There is similarly no need to consider claim reduction on the law. Some amici argue that contribution and claim reduction are corollary notions or similar methods of liability allocation which must be considered together.[6] To the contrary, the notions of contribution and claim reduction are legally and conceptually distinct and contribution

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[5] Amici of course do not seek to maintain a rule which permits double recovery; the established rule, discussed *infra*, deducts the actual amount received in any prior settlement from a trebled judgment. *Hydrolevel Corp.* v. *American Society of Mechanical Engineers, Inc.*, 1980-81 Trade Cas. (CCH) ¶ 63,651 (2d Cir. 1980); *Flintkote Co.* v. *Lysfjord*, 246 F.2d 368 (9th Cir.), *cert. denied*, 355 U.S. 835 (1957).

[6] *See*, Brief of Weyerhaesuer Company and Willamette Industries, Inc. at 2; Brief of Georgia Pacific Corporation and Packaging Corporation of America at 2, n. 2.

exists without the benefit of claim reduction in many areas of the law. More importantly, claim reduction in antitrust cases raises policy questions more vital and fundamental than those raised by contribution.

The fundamental differences between these two notions at once becomes apparent when they are compared. Contribution permits tortfeasors who have been found liable and have satisfied a judgment to allocate some of their liability among their other joint tortfeasors. *Edmonds* v. *Compagnie Generale Transatlantique,* 443 U.S. 256, 260 n.8 (1979). Contribution involves nothing more than the allocation of established liability among defendants and in no way affects a plaintiff's recovery.

Claim reduction on the other hand, does not allocate established liability among joint tortfeasors. Rather, it extinguishes a portion of a plaintiff's claim when he settles with one defendant and continues to prosecute his case against the remaining defendants. Claim reduction, therefore, has little to do with allocating liability among joint tortfeasors. It is really a rule of settlements which, as demonstrated in Part II of this Brief, undermines section 4 of the Clayton Act, 15 U.S.C. § 15, and undermines the concept of joint and several liability.

This basic difference between a right of contribution and a right of claim reduction was recognized by this Court in *Edmonds* v. *Compagnie Generale Transatlantique, supra.* There, in commenting on the right of contribution in admiralty cases, this Court emphasized that such a right could not be used to deprive a plaintiff of a full recovery for his injury. The Court wrote:

> [T]he general rule is that a person whose negligence is a substantial factor in the plaintiff's indivisible injury is entirely liable even if other factors concurred in

> causing the injury. Normally, the chosen tortfeasor may seek contribution from another concurrent tortfeasor . . . . Contribution remedies the unjust enrichment of the concurrent tortfeasor, see Leflar, Contribution and Indemnity Between Tortfeasors, 81 U. Pa. L. Rev. 130, 136 (1932), and while it may sometimes limit the ultimate loss of the tortfeasor chosen by the plaintiff, it does not justify allocating more of the loss to the innocent employee, who was not unjustly enriched. Our prior cases recognize that. Even before *Reliable Transfer,* we apportioned damages between vessels that collided and sued one another. *Reliable Transfer* merely changed the apportionment from equal division to division on the basis of relative fault. ***But we did not upset the rule that the plaintiff may recover from one of the colliding vessels the damage concurrently caused by the negligence of both.***

Id. at 271-2 n.30. (citations omitted) (emphasis supplied).

Similarly, the Third Circuit Court of Appeals in *Glus* v. *G. C. Murphy Co.,* 629 F.2d 248, 257-58 (3rd Cir. 1980), while recognizing a right to contribution in Title VII cases, refused to grant a non-settling defendant's request to reduce the plaintiff's recovery by one-half to reflect a nominal settlement with the other defendant. Claim reduction therefore is not an integral part of or corollary to contribution, either conceptually or legally.

Due to the differences between contribution and claim reduction, claim reduction raises a host of issues which are not raised by contribution and which have not been briefed by Petitioner or the amici urging adoption of such a right. Those issues, which are discussed below, raise fundamental questions of antitrust law and policy which require the most careful and painstaking consideration. The Throw-

sters respectfully submit that these are questions which the Congress should address rather than the courts. If this Court believes that claim reduction is a question appropriate for judicial resolution, the Throwsters urge that it address that question in a case which squarely raises the issue and in which the parties have an opportunity to fully brief the implications of that separate and distinct concept. The Throwsters address these implications in the following section of this Brief.

II.

Claim Reduction Overturns Long Established Rules of Antitrust Law.

A. *Claim Reduction Is Prohibited by Section 4 of the Clayton Act and, If Adopted, Would Effectively Amend It.*

The basic statutory command of the antitrust laws on which all treble damage actions are based is section 4 of the Clayton Act, 15 U.S.C. § 15. Section 4 provides in pertinent part that:

> Any person who shall be injured in his business or property by reason of any thing forbidden in the antitrust laws may sue therefor in any district court of the United States . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Claim reduction offends the command of section 4 by depriving a plaintiff of the recovery to which he is statutorily entitled: three times the actual damage he suffered as a result of the antitrust violation. This occurs because, under a rule of claim reduction, a portion of a plaintiff's claim is extinguished if he settles with any defendant. Thus,

under such a rule, a settlement with any defendant would preclude the plaintiff from exercising its right to satisfy fully the balance of his claim against the other joint defendants. *Flintkote Co.* v. *Lysfjord,* 246 F.2d 368, 398 (9th Cir.), *cert. denied,* 355 U.S. 835 (1957); *Hydrolevel Corp.* v. *American Society of Mechanical Engineers, Inc.,* 1980-81 Trade Cas. (CCH) ¶ 63,651 (2d Cir. 1980).

This is demonstrated by a simple example. Assume that a plaintiff is damaged in the amount of $50,000 as a result of an illegal price fixing conspiracy among three conspirators. Under section 4, the plaintiff is statutorily entitled to a treble damage judgment in the amount of $150,000. If the plaintiff settles with one of the defendants prior to trial for $10,000, his rights under section 4 are preserved because he may continue to prosecute his action against the remaining defendants for the full amount of his injury. If the plaintiff succeeds in establishing that he was injured in the amount of $50,000, that amount will be trebled and, under existing law, the $10,000 settlement amount will then be deducted. *Flintkote Co.* v. *Lysfjord, supra; Hydrolevel Corp.* v. *American Society of Mechanical Engineers, Inc., supra.* Thus, the plaintiff will recover the $150,000 to which he is entitled under section 4: $140,000 from the non-settling defendants and $10,000 from the settling defendant.

Claim reduction, however, ignores the plaintiffs' rights under section 4 by arbitrarily reducing the claim against the remaining defendants in a manner which may be unforeseeable at the time of the settlement. If the per capita method of claim reduction proposed by Petitioner is ultimately adopted, the plaintiff in the above example would lose one-third of his claim as a result of his $10,000 settlement. Thus, under this form of claim reduction, his maximum recovery would be $110,000 despite the fact that

he is entitled under section 4 to recover $150,000. Alternatively, his recovery might be measured (and reduced) by an assessment of relative culpability of the defendants, or their respective participation in transactions in suit, or on some other basis. This result is plainly prohibited under section 4 and, if sanctioned, would implicitly amend the statute.

B. *Claim Reduction Undermines the Concept of Joint and Several Liability.*

It is established that liability in antitrust treble damage actions is joint and several. *Solomon* v. *Houston Corrugated Box Co., Inc.*, 526 F.2d 389, 392 n.4 (5th Cir. 1976); *Washington* v. *American Pipe & Construction Co.*, 280 F. Supp. 802, 804 (S.D. Cal. 1968); *Wainwright* v. *Kraftco Corp.*, 58 F.R.D. 9, 11-12 (N.D. Ga. 1973). The joint and several nature of antitrust liability was explained by Mr. Justice White in his concurring opinion in *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134 (1968). There, Mr. Justice White wrote:

> [A] third party proving an illegal undertaking between two defendants may recover for all damages caused by the combination. Those damages normally may be had from either or both defendants without regard to their relative responsibility for originating the combination or their different roles in effectuating its ends. This is because neither defendant, if he acted alone, could be charged with the violation; some degree of participation by both is essential to create a combination within the reach of § 1 of the Sherman Act. Either defendant is therefore deemed to have been a material cause of the damages, sufficient to permit a third party to recover.

392 U.S. at 144.

Adoption of a rule of claim reduction is inconsistent with the principle of joint and several liability, in that such a rule must rest upon a premise that any individual defendant is responsible for only a portion of the total damage inflicted by the combination. The full implications of such a premise threaten sweeping complications in already complex antitrust litigation.

In a world of contribution and claim reduction, a plaintiff may lose his right to satisfy an antitrust judgment against any or all of the antitrust defendants, as each defendant asserts his contribution and claim reduction rights in an effort to minimize his payment to the plaintiff. Defendants would support this position by claiming that since rights of contribution and claim reduction limit a defendant's liability to a share of the plaintiff's total damage, the court must determine each defendant's liability share, with plaintiff to be limited to collecting that share from each defendant.

The result will be extraordinary complication of treble damage suits. Pretrial and trial will be complicated by consideration of relative fault, relative size, market share and extent of participation by defendants in individual transactions as the court and litigants struggle to apply the appropriate method of claim reduction. Post judgment proceedings will be complicated by questions as to the impact on the allocation of liability of insolvencies, jurisdictional problems and difficulties in levying execution upon assets of the various defendants. This will add yet another level of delay to antitrust proceedings and will frustrate the efforts of plaintiffs to vindicate their rights under section 4 of the Clayton Act. Even where no settlement has occurred, difficulties in enforcing a judgment may deprive a plaintiff of his full statutory recovery.

III.

Considerations of Antitrust Policy Do Not Support Adoption of a Rule of Claim Reduction.

The parties before the Court and certain other amici have presented a number of policy considerations which they believe should be examined in deciding the issue before the Court. The Throwsters do not wish to add to the arguments concerning those issues as they relate to contribution. It is important, however, to review those issues as they relate to claim reduction. The Throwsters submit that these considerations demonstrate that claim reduction is a question which only Congress can meaningfully address and that, after consideration, it should be rejected.

A. *The Coercive Effect of Large Multi-Defendant Antitrust Actions Does Not Require Adoption of a Rule of Claim Reduction.*

A number of the amici argue that rights of contribution and claim reduction are needed to redress an imbalance in the relative negotiating strengths of plaintiffs and defendants in large antitrust treble damage actions. The amici argue that the combination of the treble damage remedy and joint and several liability combine to create enormous exposure which coerces defendants into extortionate settlements.[7]

The Throwsters submit that the concern expressed by some of the amici about coercion is overstated. In any lawsuit where there are multiple defendants, a clever plaintiff can endeavor to divide the defendants and cause them to bid against each other in an attempt to gain a favorable

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[7] *See* Brief of Westvaco Corporation at 9-11; Brief of The Mead Corporation at 8-15; Brief of Weyerhaeuser Company and Willamette Industries, Inc. at 4-9.

settlement. This is not unique to antitrust litigation. It can occur in any case involving multiple defendants.

Defendants in such cases, however, are not without impressive resources of their own. If defendants fear the kind of coercive settlement tactics which some of the amici claim to have experienced, they can enter into a sharing agreement so that no one defendant is forced to assume the risk of paying the damage judgment for all the defendants. Such an agreement certainly removes the element of fear which the amici claim led to the "settlement stampede" in the *Corrugated Container Antitrust Litigation.* Alternatively, defendants can agree to insist on a global settlement and thereby frustrate a plaintiff who seeks to pursue a "divide and conquer" strategy.

Defendants can also insist, as part of any settlement into which they enter, that the plaintiff reduce his claim against the remaining defendants or agree to hold them harmless from any contribution claims asserted against them by non-settling defendants. Significantly, in *Corrugated* one settling defendant, Westvaco, apparently succeeded in obtaining just such a claim reduction provision.[8] For a defendant in *Corrugated,* which has been presented to this Court as the archetypal example of a coercive settlement case, to obtain a consensual claim reduction agreement as part of its settlement, casts significant doubt on on the severity of the coercion problem. In any event, if, as a number of amici indicate, claim reduction can be and is voluntarily negotiated between plaintiffs and defendants in antitrust cases, there is no need to change the law to make claim reduction mandatory.[9] Coercion is therefore not

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[8] *See* Brief of Weyerhaeuser Company and Willamette Industries, Inc. at 20-21.

[9] *See* Brief of Weyerhaeuser Company and Willamette Industries, Inc. at 21 n.24; Brief of CPC International Inc. at 7.

a sufficient justification for creating a right of claim reduction.

B. *Claim Reduction Is Unfair.*

A significant argument made in support of contribution and claim reduction is that it eliminates unfairness in antitrust cases by apportioning liability among antitrust violators.[10] The Throwsters respectfully submit that a rule of claim reduction, whether adopted as part of a right of contribution or not, will not effectively remedy this perceived unfairness.

If a rule of claim reduction is to be adopted, consideration must be given to the method of claim reduction to be used. The Petitioner here proposes use of a per capita method of allocating liability.[11] Olson Farms Inc. in its brief proposes to base claim reduction on the settling defendant's market share.[12] Still other proposals for claim reduction call for use of a relative fault standard. Sullivan, *New Perspectives in Antitrust Litigation: Towards a Right of Comparative Contribution,* 1980-2 U. Illinois Law F. 389, 422. If a rule of claim reduction is adopted which incorporates only one of these standards, unfair and prejudicial results in some cases are inevitable. Examples of the type of inequity which can result under each of these methods are briefly outlined below.

1. *Per Capita Claim Reduction*—Under a method of per capita claim reduction, the damages resulting from the violation are divided by the number of conspirators. Each conspirator bears an equal share of the liability regardless

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[10] *See* Brief of Petitioner at 11-15.

[11] *Id.* at 27.

[12] Brief of Olson Farms Inc. at 18.

of its degree of fault, the financial benefit derived from the violation or its ability to pay.

Under this form of claim reduction, if the largest and most culpable defendant settles early, the claim against the remaining defendants will be reduced only by the settling defendant's per capita share of the liability. For a small defendant who was a latecomer to the conspiracy and profited little from it, this is fundamentally inequitable.

2. *Market Share Claim Reduction*—The alternative measure of basing claim reduction on the relative market shares of the defendants is similarly fraught with inequity. Under this approach, claims against non-settling defendants will be reduced by a percentage equal to the settling defendant's percentage of the market.

While at first blush this approach might seem to be basically fair, it is easy to imagine situations where it is grossly unjust. One such situation is the case where a small company with a relatively large market share was involved on the fringes of a price fixing conspiracy which was led by a large, diversified company which had a relatively small share of the market. If the large, guilty company settles with the plaintiff early in the case—as it should according to the amici—the claim against the remaining defendants will be reduced only by a small percentage equal to the settling defendant's small market share. For the small company with the large market share, such a reduction in its potential exposure has little meaning. It will still be faced with paying a significant portion of the ultimate damage award despite the fact that it was on the fringes of the conspiracy and is not as able as the settling defendant to satisfy such a judgment. For this non-settling defendant, market share claim reduction is grossly inequitable.

3. *Relative Fault Claim Reduction*—From the standpoint of fairness, perhaps the most attractive method of claim reduction is based on the relative fault of the parties. Unfortunately, this method of claim reduction does not address the concerns voiced by contribution and claim reduction proponents. Under this form of claim reduction, a settling defendant's degree of fault is assessed and that portion of total liability is eliminated from the claim facing the non-settling defendants.

The determination of the settling defendant's liability, however, cannot be made until trial. As a result, non-settling defendants remain uncertain over the potential liability which they continue to face and the pressure generated by this uncertainty may generate the same type of settlement coercion to which the amici now object. In addition, they face the same problems of unfairness which result if ability to pay and market significance are not considered. Relative fault will not, therefore, resolve the problem of unfairness.

As these examples demonstrate, claim reduction is not a panacea for the problem of unfairness. Even if combined with a right of contribution, the problems of unfairness persist. Accordingly, adoption of a right to claim reduction in antitrust cases cannot be justified by considerations of fairness.

C. *Claim Reduction Will Complicate Antitrust Litigation.*

A major concern of proponents of contribution is that contribution will complicate litigation and chill settlements if non-settling defendants are allowed to assert contribution claims against settling defendants.[13] Claim reduction

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[13] Brief of Weyerhaeuser Company and Willamette Industries, Inc. at 12.

is considered by some to be a solution to this problem because it releases the settling defendant from the litigation. While this may conceivably occur, the Throwsters are convinced that claim reduction will further complicate antitrust litigation and will impose a whole series of new issues on antitrust trials which will make them increasingly difficult to try for both judges and lawyers.

Claim reduction will complicate antitrust litigation by forcing the plaintiff and non-settling defendants to determine at trial how much the claim should be reduced as a result of one or more settlements. In making this inquiry, a threshold determination must be made as to whether the settling defendant in fact violated the antitrust laws. If the settlors are found to be innocent, logic dictates that the claim against the non-settling defendants not be reduced. The problem posed by this inquiry is that it requires that the settling defendant be tried almost as if he were still in the case.

If any claim reduction method other than per capita is used, additional evidence concerning the settling defendant will need to be adduced to establish the basis for reducing the plaintiff's claim to take account of the settlement. If claim reduction is based on market share, this will require evidence of the settlor's market share or sales. If claim reduction is based on relative fault, the settling defendant's conduct will have to be examined to establish his degree of fault. This will effectively require trying the settling defendant as if he had never settled.

The addition of this new issue of proof in treble damage actions will further complicate already complex and cumbersome antitrust litigation. Claim reduction therefore will certainly not be a mechanism which simplifies litigation and it cannot be justified on those grounds.

D. *Claim Reduction Will Discourage Settlements.*

Ironically, claim reduction, which Petitioner and certain amici view as a solution to the settlement obstacles created by contribution,[14] is itself a potentially impassable obstacle to settlements, and reduces the prospect of any settlement to the likelihood of settling with the most recalcitrant defendant. As demonstrated in part IIB of this Brief, different methods of applying claim reduction involve result in serious inequities in certain situations. In order to avoid the inequities caused by the use of a single method of claim reduction, it is rational to apply a method of claim reduction which is most equitable under the circumstances presented in a given case. The fatal vice of such an approach, however, is that it creates such uncertainty as to the actual impact of a settlement on the plaintiff's remaining claim, that he will not settle without negotiating with all defendants.

A short example makes this clear. If a plaintiff wishes to settle with a large defendant who has a relatively large market share, but is one of many corporate defendants, it will be vital to the plaintiff in evaluating the settlement to know which method of claim reduction the court may ultimately use. If the court were to use per capita claim reduction, the settlement might be quite attractive. If, on the other hand, the court were to use a market share or relative fault method, the settlement might be unacceptable.

Conceivably, the plaintiff could seek the court's guidance on the matter, but it is unlikely that the court will be in a position to make a definitive ruling on the matter before trial. If the choice of claim reduction method is to be based

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[14] See Petitioner's Brief at 26-27, Brief of Weyerhaeuser Company and Willamette Industries, Inc. at 12-14; Brief of Georgia Pacific Corporation and Packaging Corporation of America at 25-26.

on basic fairness, the court will almost certainly be unable to make that determination until it is able to weigh the equities at trial. Once the decision on method of claim reduction is made, the court may still have to wait until the end of trial to develop the necessary information to apply the chosen claim reduction method.

The uncertainty created by the court's choice of a method of claim reduction will be intolerable to many plaintiffs. It will put them in the position of having a claim whose value fluctuates wildly with the choice of the claim reduction method. Moreover, this uncertainty will be compounded by each additional settlement into which the plaintiff enters. The result of this enormous uncertainty may well be that many plaintiffs will insist on global settlements or refuse to settle at all.[15] This serious disincentive to settlement is a strong policy reason for rejecting a right of claim reduction.

E. *Claim Reduction Will Undermine Deterrence.*

One of the major controversies surrounding the question of contribution is the impact which such a right will have on the deterrent effect of the antitrust treble damage action. Proponents of contribution contend that contribution will deter antitrust violations by increasing the probability that violators will be forced to satisfy a portion of a treble damage judgment. *Professional Beauty Supply, Inc.* v. *National Beauty Supply, Inc.*, 594 F.2d 1179 (8th Cir. 1979). Contribution opponents, on the other hand, assert that

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[15] The uncertainty created by claim reduction may cripple partial settlements in class actions. If a class representative and his attorney can only guess about the result which a settlement may have on the balance of their claim, it is not at all clear how they can recommend such a settlement to the court as being in the best interests of the class. Nor is it clear how a court could approve such a settlement.

deterrence is maximized by threatening antitrust violators with a disproportionately large treble damage award. *Wilson P. Abraham Const. Co.* v. *Texas Industries, Inc.*, 604 F.2d 897 (5th Cir.), *en banc hearing denied*, 608 F.2d 524 (1979), *petition for cert. granted sub nom., Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, No. 79-1144, 49 U.S.L.W. 3321 (Nov. 3, 1980).

Claim reduction, unlike contribution, does not give rise to a dispute over its impact on deterrence. A right of claim reduction will, without question, reduce deterrence. The rationale for this conclusion is straightforward. Like contribution, claim reduction reduces the likelihood that one defendant will be forced to satisfy a disproportionately large judgment which includes damages attributable to his joint tortfeasors. This characteristic of claim reduction unambiguously leads to a reduction in deterrence.

Unlike contribution, however, claim reduction does not insure that all the wrongdoers pay for their violation of the antitrust laws. Under claim reduction, a defendant can settle cheaply with the plaintiff and never be called to account for his wrongdoing. Thus, under claim reduction, the deterrent enhancing impact of contribution—increased probability that all wrongdoers pay treble damages—is lost, while the risk that some defendants will face disproportionate treble damage awards is lost as well. The result is an unambiguous loss of deterrence.

Claim reduction also reduces deterrence by reducing the incentive of plaintiffs to sue. Potential antitrust violators know that under existing law the prospect of a full treble damage recovery increases the likelihood that their transgressions will result in litigation. Claim reduction creates a disincentive for plaintiffs to bring such litigaton by presenting them with a further risk of a small recovery, which

must be added to the enormous existing risks of litigating complex cases against well-funded antitrust violators. By rendering the prospect of litigation less certain, claim reduction reduces deterrence.[16]

The arguments reviewed in this section of this Brief establish, if nothing else, that the number and complexity of the policy considerations relevant to the assessment of a right of claim reduction make this issue one for Congress to decide. The very concept of treble damages is heavily freighted with Congressional purpose. Consideration of a rule which will produce a recovery of less than full treble damages should not, the Throwsters submit, be adopted by a judicial uprooting of long-established principles.

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[16] Although claim reduction reduces the likelihood that any particular litigation will be brought, it is likely to increase rather than reduce the overall number of antitrust actions brought. This result flows from the prospect of an increased number of violations in light of the weakening of deterrence. As violations increase, the number of actions will inevitably increase, even though a smaller percentage of the total number of violations will give rise to suits.

IV.

If This Court Adopts a Rule of Claim Reduction, It Should Not Apply the Rule Retroactively So As to Undermine Past Settlements.

If this Court adopts a rule of claim reduction, the Throwsters respectfully request that it not be applied retroactively to settlements entered into prior to this Court's decision.

It is well established that new rules of law, whether set forth by statute or judicial decision, are to be given prospective-only application where their retrospective application would result in serious prejudice or hardship. *Great Northern Ry. Co.* v. *Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932); *England* v. *Louisiana State Board of Medical Examiners*, 375 U.S. 411, 422 (1964); *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971). Application of a rule of claim reduction to the Throwsters' six year old settlements—which were made in reliance on then unquestioned law and in which the Throwsters expressly reserved their claims against the non-settling defendants—would seriously prejudice the Throwsters, undermine years of investment and effort in seeking to recover for the antitrust injuries they suffered and give the defendants in the *Duplan* litigation, adjudicated antitrust violators, a windfall which they never expected and to which they are not entitled.

This conclusion is confirmed by the fact that those courts which have been faced with either the contribution or claim reduction question in antitrust cases have uniformly refused to permit such claims where to do so would tend to undermine previously existing settlements. *In re Corrugated Container Antitrust Litigation*, 1979-1 Trade Cas. (CCH) ¶ 62,690 (S.D. Tex. 1979), *aff'd*, No. 79-2439 (5th

Cir. October 30, 1979) (unreported), *cert. dismissed*, 49 U.S.L.W. 3288 (October 20, 1980) (No. 79-972) (where the court also refused to recognize a claim reduction defense); *Hedges Enterprises* v. *Continental Group, Inc.*, 1979-1 Trade Cas. (CCH) ¶ 62,717 (E.D. Pa. 1979); *In re Ampicillin Antitrust Litigation*, 1979-2 Trade Cas. (CCH) ¶ 62,936 (D.D.C. 1979). The rationale of the court in *Corrugated Container* is particularly cogent and directly applicable in this regard:

> If, however, the rule [against contribution] were eventually to be otherwise in this circuit, there is a compelling reason not to grant the motions of Westvaco and the three other defendants in this case, at this time. Such a rule should not be applied retroactively where the settling litigants have relied on unvarying past precedent in reaching agreements with the plaintiffs' class. . . . It would be inequitable to apply such a rule retroactively to this case.

1979 Trade Cas. (CCH) ¶ 62,690 at 77,880.

The Throwsters respectfully submit that if this Court adopts a rule of claim reduction for antitrust cases it specify that such a rule not apply to pre-existing settlements.

CONCLUSION

For the foregoing reasons, the Throwsters respectfully submit that this Court affirm the decision of the United States Court of Appeals for the Fifth Circuit in *Wilson P. Abraham Construction Corp.* v. *Texas Industries, Inc.* The Throwsters also respectfully request that this Court not address the question of claim reduction in this case or, if the Court does address that question, that it reject claim reduction. If the Court should decide to adopt such a rule, the Throwsters request that it be held inapplicable to to pre-existing settlements.

Respectfully submitted,

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No. 79-1144

In the Supreme Court of the United States

OCTOBER TERM, 1980

TEXAS INDUSTRIES, INC.,
Petitioner,
v.
RADCLIFF MATERIALS, INC., et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Brief of Georgia-Pacific Corporation and Packaging Corporation of America as Amici Curiae

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF THE AMICI 1

SUMMARY OF ARGUMENT 4

ARGUMENT 5

I. The Absence of Contribution and Claim Reduction in Antitrust Litigation Creates Grossly Inequitable Settlement Coercion on Defendants 6

II. Contribution Rights Are Particularly Appropriate for Antitrust Cases 14

III. Contribution and Claim Reduction Promote Fairness in Antitrust Litigation 24

CONCLUSION 30

TABLE OF AUTHORITIES

CASES

Page

Appalachian Coals, Inc. v. United States, 288 U.S. 344 (1933) 20

Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251 (1946) 20

Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1 (1979), *on remand,* 620 F.2d 930 (2d Cir. 1980) 20

Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977) 20

Cooper Stevedoring Co. v. Fritz Kopke, Inc., 417 U.S. 106 (1974) 14, 24

Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978) 11

In re Corrugated Container Antitrust Litigation, No. 79-2439 (5th Cir. Oct. 30, 1979) 3

In re Corrugated Container Antitrust Litigation, 84 F.R.D. 40 (S.D. Tex. 1979) 3, 11

In re Corrugated Container Antitrust Litigation, 80 F.R.D. 244 (S.D. Tex. 1978), *mandamus denied,* No. 78-3684 (5th Cir. 1978) 2

Doyle v. United States, 441 F. Supp. 701 (D.S.C. 1977) 27

In re Folding Carton Antitrust Litigation, M.D.L. No. 250 (N.D. Ill.) 14

Folding Cartons, Inc. v. American Can Co., No. 76 C 1113 (N.D. Ill.) 18

Globus, Inc. v. Law Research Service, Inc., 318 F. Supp. 955 (S.D.N.Y. 1970), *aff'd*, 442 F.2d 1346 (2d Cir.), *cert. denied*, 404 U.S. 941 (1971) 22

Glus v. G.C. Murphy Co., 629 F.2d 248 (3d Cir. 1980) 14, 24

Gomes v. Brodhurst, 394 F.2d 465 (3d Cir. 1968) 14, 24, 26

Heizer Corp. v. Ross, 601 F.2d 330 (7th Cir. 1979) 14, 22, 24, 25

Hooley v. Red Carpet Corp. of America, 1975-1 Trade Cas. ¶ 60,285 (D. Ore. 1975), *appeal dismissed*, 549 F.2d 643 (9th Cir. 1977) 11

Illinois Brick Co. v. Illinois, 431 U.S. 720, *rehearing denied*, 434 U.S. 881 (1977) 20

Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 110 A.2d 24 (1954) 26, 27

Kline v. Coldwell, Banker & Co., 508 F.2d 226 (9th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975) 11

Kohr v. Allegheny Airlines, Inc., 504 F.2d 400 (7th Cir. 1974), *cert. denied*, 421 U.S. 978 (1975) 14, 24

Leger v. Drilling Well Control, Inc., 592 F.2d 1246 (5th Cir. 1979) 27

Little Rock School District v. Borden, Inc., 1980-1 Trade Cas. ¶ 63,059 (E.D. Ark. 1979) 28

Mckenna v. Austin, 134 F.2d 659 (D.C. Cir. 1943) 26, 28

Martello v. Hawley, 300 F.2d 721 (D.C. Cir. 1962) 14, 26, 27

Page

The Max Morris, 137 U.S. 1 (1890) 24

Mid-West Paper Prods. Co. v. Continental Group, Inc., 596 F.2d 573 (3d Cir. 1979) 16

Olson Farms, Inc. v. Safeway Stores, Inc., 1979-2 Trade Cas. ¶ 62,995 (10th Cir. 1979), *en banc rehearing granted and pending* (Dec. 27, 1979) 13, 17, 22

Palestine Contractors, Inc. v. Perkins, 386 S.W.2d 764 (Tex. 1964) 26

Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464 (1962) 18

Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179 (8th Cir. 1979), *en banc rehearing denied* (April 17, 1979) 19, 22, 24, 25, 28

Ratner v. Chemical Bank New York Trust Co., 54 F.R.D. 412 (S.D.N.Y. 1972) 11

Reiter v. Sonotone Corp., 442 U.S. 330 (1979) 11

Sattelberger v. Telep, 14 N.J. 353, 102 A.2d 577 (1954) 27

Simpson v. Union Oil Co., 377 U.S. 13 (1964) 22

Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555 (1931) 20

Sugar Institute, Inc. v. United States, 297 U.S. 553 (1936) 20

United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967) 22

United States v. Consolidated Packaging Corp., 575 F.2d 117 (7th Cir. 1978) 17

Page

United States v. Container Corp. of America, 393 U.S. 333 (1969) 21

United States v. Container Corp. of America, 273 F. Supp. 18 (M.D.N.C. 1967) 21

United States v. National Container Ass'n, 1940-1943 Trade Cas. ¶ 56,028 (S.D.N.Y. 1940) 21

United States v. Reliable Transfer Co., 421 U.S. 397 (1975) 18, 23

United States v. Topco Associates, Inc., 405 U.S. 596 (1972) 22

United States v. United States Gypsum Co., 438 U.S. 422 (1978) 15, 16, 19, 20, 21

Wilson P. Abraham Constr. Co. v. Texas Indus., Inc., 604 F.2d 897 (5th Cir.), *en banc rehearing denied*, 608 F.2d 524 (1979), *petition for cert. granted sub nom. Texas Indus., Inc. v. Radcliff Materials, Inc.*, No. 79-1144, 49 U.S.L.W. 3321 (Nov. 3, 1980) 15, 16, 23

STATUTES

15 U.S.C. §§ 1, 2 ..... 1, 19

RULES

Fed. R. Civ. P. 11 18

MISCELLANEOUS

American Bar Ass'n, Section of Antitrust Law, *Resolution and Report of the Section of Antitrust Law of the American Bar Association on Proposed Amendment of the Clayton Act to Permit Contribution in Damage Actions Brought Thereunder*, Aug. 17, 1979 22

Page

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Manual for Complex Litigation (1977) 8

Rudnitsky & Blyskal, *Getting Into Those Deep Pockets,* Forbes, Aug. 4, 1980 6

Wall Street Journal, Oct. 26, 1976 6

No. 79-1144

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Respondents.

Brief of Georgia-Pacific Corporation and Packaging Corporation of America as Amici Curiae

Georgia-Pacific Corporation ("Georgia-Pacific") and Packaging Corporation of America ("PCA") submit this brief as amici curiae in support of petitioner Texas Industries, Inc., and respectfully urge the Court to recognize rights of contribution among antitrust defendants. As set forth in this brief, Georgia-Pacific and PCA are keenly interested in the Court's resolution of the important issue before it in this case and are particularly well situated to be able to present to the Court certain considerations that, though highly pertinent to that issue, may not be fully developed by the parties.

INTEREST OF THE AMICI

Georgia-Pacific and PCA are two of the 37 defendants in *In re Corrugated Container Antitrust Litigation,* M.D.L. No.

310 (the *"Corrugated Litigation"*), which is a consolidated, multidistrict proceeding pending in the United States District Court for the Southern District of Texas, Houston Division. The *Corrugated Litigation* comprises more than 60 separate lawsuits, including both class action cases and cases commenced by plaintiffs who opted out of the plaintiff class certified in that litigation.[1] The *Corrugated Litigation* plaintiffs have alleged that the defendants engaged in a conspiracy to fix the prices of corrugated containers and corrugated sheets in violation of section 1 of the Sherman Act, 15 U.S.C. §1.

The contribution issue was raised at an early stage in the *Corrugated Litigation*. Shortly after two of the defendants entered into settlement agreements with the class action plaintiffs, another defendant, Westvaco Corporation, sought leave of court to amend its previously filed answers to assert contribution cross-claims against those two settling defendants. After additional settlements were entered into, Westvaco filed an amended motion seeking leave of court to plead (1) contribution cross-claims against all other defendants that had settled and (2) an affirmative defense of claim reduction[2] based upon those settlements. At that time, Georgia-Pacific and PCA also moved the district court for leave to amend their respective answers to plead contribution cross-claims and defenses.[3]

[1] *See* In re Corrugated Container Antitrust Litigation, 80 F.R.D. 244 (S.D. Tex. 1978), *mandamus denied*, No. 78-3684 (5th Cir. 1978).

[2] "Claim reduction" is a means to implement contribution under which a plaintiff's claim against a nonsettling joint wrongdoer is reduced proportionately to reflect the plaintiff's settlement with another who would have been jointly and severally liable with the nonsettling wrongdoer. Claim reduction should be an integral part of a rule of contribution in antitrust cases and this Court's disposition of the case now before it necessarily should include consideration of such a complete rule of contribution. *See* pp. 24-29 *infra*.

[3] A more complete description of the settlement history in the *Corrugated Litigation* is set forth in section I of the argument portion of this brief (pp. 6-14 *infra*).

The district court denied the motions to amend filed by Westvaco, Georgia-Pacific and PCA[4] and, on appeal from the district court's entry of judgment pursuant to rule 54(b) of the Federal Rules of Civil Procedure, the Court of Appeals for the Fifth Circuit affirmed that ruling in an unpublished, per curiam opinion.[5] On June 16, 1980, this Court granted the petition of Westvaco, Georgia-Pacific and PCA for a writ of certiorari to review the contribution ruling of the Court of Appeals in the *Corrugated Litigation* and to decide the same issue raised in the case *sub judice*—whether antitrust defendants may assert rights of contribution.[6] On October 20, 1980, however, this Court granted the motion of certain respondents to dismiss that writ of certiorari.[7]

The absence of established contribution rights in antitrust cases has had and continues to have direct impact upon Georgia-Pacific and PCA in the *Corrugated Litigation* and gives them a substantial interest in the contribution issue now before the Court. Both of these companies, as well as many others, have been victims of a denial of contribution rights in that litigation: though each of these companies firmly believed in its innocence of the allegations against it, each was compelled to settle with the *Corrugated Litigation* class action plaintiffs because of the inordinate damage exposure they

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[4]In re Corrugated Container Antitrust Litigation, 84 F.R.D. 40 (S.D. Tex. 1979).

[5]In re Corrugated Container Antitrust Litigation, No. 79-2439 (5th Cir., Oct. 30, 1979).

[6]Westvaco Corp., et al. v. Adams Extract Co., et al., No. 79-972. Subsequently, as part of a settlement agreement with the class action plaintiffs in the *Corrugated Litigation*, Westvaco agreed to discontinue its efforts to pursue the contribution issue in this Court.

[7]On December 15, 1980, the Court denied a petition for rehearing filed by Georgia-Pacific and PCA in No. 79-972. The various briefs filed by the petitioners in No. 79-972 prior to the Court's October 20, 1980, order in that case describe (with appropriate references to the joint appendix) the portions of the record in the *Corrugated Litigation* relevant to the contribution issue.

faced resulting from earlier settlements by virtually all other defendants in the absence of an established contribution rule. Moreover, the continued, direct interest of these companies in the recognition by this Court of the equitable doctrine of contribution in antitrust cases arises not only from the grossly unfair consequences already wrought in that litigation but also from the continued importance of the contribution issue in the *Corrugated Litigation* opt-out cases, which these companies are still actively defending and which are still in the pretrial discovery stage in the district court in Houston.

SUMMARY OF ARGUMENT

This Court should adopt an appropriate contribution rule for civil antitrust cases in order to promote justice and fairness. The rule of law denying contribution rights has been recognized as outmoded in nearly every other field of law, and there is no sound reason for rejecting this rule of fundamental fairness in antitrust cases. There is an obvious and compelling need to eliminate the opportunity for the kind of settlement abuse that became a reality in the *Corrugated Litigation* and other kinds of abuse that can occur in the absence of contribution.

The recognition of contribution rights in antitrust cases would eliminate such abuses and would foster a just system for the civil enforcement of the antitrust laws consistent with the underlying objective of those laws and with every defendant's right to a fair and realistic opportunity to litigate or settle claims against it on the merits of those claims. This Court and other courts have sought to avoid unwarranted overdeterrence from an unduly strict imposition of sanctions for violation of the antitrust laws. In treble damage actions, the staggering damage exposure that can result from a denial of contribution rights coupled with joint and several liability creates an unjustifiable measure of deterrence without furthering the legitimate objectives of the antitrust laws. Denial of contribution rights

creates underdeterrence of the most culpable antitrust violators, who can obtain sweetheart settlements or avoid suit altogether, while forcing the less culpable, as well as those defendants wrongly accused, to bear a disproportionate and inequitable share of damages. Rights of contribution achieve fair and properly balanced deterrence in the private enforcement of the antitrust laws.

The Court should not adopt a rule of contribution among defendants that would be unfair to settling defendants. In the context of partial settlements of antitrust cases, contribution and compromise of litigation can be harmonized by claim reduction. In horizontal price fixing cases, the plaintiffs' claims should be reduced by a proportionate amount based upon the sales of the products involved by settling defendants. This rule will not discourage fair settlements. This rule, however, does eliminate a frequently voiced objection to the recognition of contribution—that it will impede the settlement process—and will result in settlements that are related to the merits of the alleged claims as against each defendant.

ARGUMENT

Petitioner Texas Industries, Inc., can be expected to set forth in its brief numerous, compelling reasons for application of contribution principles in antitrust cases. Georgia-Pacific and PCA endorse those arguments, which are premised upon the inherent fairness of contribution and the beneficial effects that it can have in antitrust litigation. The case now before the Court, however, does not involve directly certain considerations that regularly arise in antitrust treble damage litigation: for example, this case does not involve allegations of antitrust violations in a major, nationwide industry where the private plaintiffs' blunderbuss pleading tactics bring virtually all major participants in the industry into the litigation; similarly, this single-defendant litigation does not present the question of the

impact of contribution on the settlement process and how contribution can and should be implemented where settlements occur in multi-defendant litigation. The *Corrugated Litigation* provides this background, which the Court should consider when it resolves the important contribution issue.

I. The Absence of Contribution and Claim Reduction in Antitrust Litigation Creates Grossly Inequitable Settlement Coercion on Defendants

The settlement history in the *Corrugated Litigation* starkly illustrates the extreme settlement abuse that results from the absence of contribution rights.

In fact, the *Corrugated Litigation* has repeated again the pattern in antitrust litigation that has become all too familiar over the last decade. First, prior to the completion of a widely publicized grand jury investigation of an industry, class actions and individual lawsuits are brought premised on the existence of the investigation against every substantial member of the industry.[8] Then, the grand jury returns indictments of only a few members of the industry.[9] As the civil actions continue against all defendants, the certification of a large class results in

[8]The Houston grand jury investigation of the corrugated industry, the publicity of which spawned the *Corrugated Litigation* while the grand jury was still sitting, became widely known more than a year before any indictments were returned. *See, e.g.*, Wall Street Journal, Oct. 26, 1976, at 28 (S.W. ed.). In such circumstances, members of the plaintiffs' bar, drawn by the prospect of quick settlements and lucrative attorneys' fees, engage in a rush to the courthouse in order to achieve a foothold on a desired forum for multidistrict litigation purposes and a leadership position among plaintiffs' counsel. *See, e.g.*, Rudnitsky & Blyskal, *Getting Into Those Deep Pockets*, Forbes, Aug. 4, 1980, at 59-62.

[9]Georgia-Pacific and PCA, along with most of the 37 civil defendants, had produced vast quantities of documents to the Government in response to subpoenas issued as part of the Houston grand jury investigation. The first *Corrugated Litigation* treble damage class actions were filed in March 1977, fully ten months before the results of the grand jury investigation were to become known. Neither Georgia-Pacific nor PCA was indicted by the Hous-

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each defendant being faced with potential liability of billions of dollars.[10] Consequently, quick but inequitable settlements having little or nothing to do with the merits are forced upon many of the defendants because plaintiffs, by divide and conquer "game theory" tactics, exploit a no-contribution, no-claim-reduction rule.

To implement their settlement strategy, the class action plaintiffs in the *Corrugated Litigation* had assigned to each defendant a number of "points" corresponding to each defendant's percentage share of all defendants' sales of corrugated containers and sheets over a period of several years. Prior to a ruling on the then pending motion for class certification, the class action plaintiffs sought and obtained "ice-breaking" settlements with two large defendants, St. Regis Paper Company, an unindicted company, and International Paper Company, which had been charged with a felony and subsequently pleaded nolo contendere, for approximately $500,000 and $1 million "per point," respectively.[11] Subsequently, after the dis-

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ton grand jury, which ultimately indicted fourteen companies in the industry. Georgia-Pacific and three other *Corrugated Litigation* defendants were not even referred to in the part of the Government's bill of particulars that listed over 600 alleged coconspirators identified as a result of the exhaustive, eighteen-month Houston grand jury investigation. In fact, Georgia-Pacific was identified as one of the accounts alleged to have suffered damages. Thus, the grand jury and the Government prosecutors who ran the investigation presumably did not believe that Georgia-Pacific was a participant in the alleged conspiracy. Subsequently, the jury in the recent class action trial against The Mead Corporation specifically found that Georgia-Pacific had not participated in the alleged conspiracy.

[10]In the *Corrugated Litigation*, plaintiffs' initial estimates of the damages claimed ranged up to almost $6 billion. Plaintiffs more recently have estimated that the judgment against The Mead Corporation—the only defendant to go to trial through verdict in the class action cases—could be as much as $1 billion, based upon a damage period much shorter than the 18-year period for which they have sought damages.

[11]Treble damage plaintiffs are induced to offer several early, discounted settlements to those defendants they believe to be most culpable in order to

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trict court certified a nationwide class of purchasers of corrugated containers or sheets, the plaintiffs concluded a settlement agreement with Union Camp Corporation, an unindicted company, for $2 million per point, an amount that was twice as much per point as had been paid by International Paper, an indicted company.

The Union Camp settlement triggered a "settlement stampede." Within two weeks, plaintiffs concluded eight additional settlements at successively higher amounts ranging up to $4.5 million per point for indicted companies and up to $2.75 million per point for unindicted companies. Settlements continued to be offered at increasingly higher amounts, and during the next few weeks nine more settlements were reached totalling more than $210 million. With each successive settlement during the stampede, plaintiffs demanded and received amounts at a higher rate per point than prior settlements.

Plaintiffs were able to escalate their settlement demands because, with joint and several liability and in the absence of contribution and claim reduction, the exposure faced by each

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capitalize on the "ice-breaking" effect of such settlements on other defendants who are, solely by reason of such settlements, faced with a substantially increased damage exposure. The logical tendency of defendants who recognize their culpability to seek early settlement in order to avoid adding substantial litigation costs to the readily perceived future burden of having to respond in damages supports the observation that "the early-settling defendants may well be those whose liability is clearest." Manual for Complex Litigation § 1.46, at 63 (1977). Moreover, the most culpable antitrust violators are induced by a no-contribution rule to seek early sweetheart settlements that will be relatively inexpensive and will enable them to retain a substantial portion of the benefits of their unlawful conduct, while leaving less culpable or wrongly accused defendants to bear the burdens of potential liability for all defendants' conduct. A no-contribution, no-claim-reduction rule enables plaintiffs to obtain settlements with the most culpable defendants, while their total damage claim against nonsettling defendants remains virtually unaffected. These undisputed consequences of a denial of contribution rights wholly distort the deterrent function of treble damage litigation. *See* pp. 22-23 *infra*.

nonsettling defendant increased with each successive settlement. The amount of each settlement was determined by the timing of other settlements rather than by the merits of the case against each defendant.[12] Certain unindicted defendants, confident of their innocence, nevertheless were compelled by economic pressures to accede to plaintiffs' settlement demands in order to avoid the loss of credit or in order to continue operations. For example, U.S. Corrugated Fibre Box Company was not indicted. Although it had the smallest market share of all *Corrugated Litigation* defendants, U.S. Corrugated settled at a rate per point eight times higher than St. Regis and four times higher than International Paper. In dollar terms this was equivalent to U.S. Corrugated's after-tax profits for three and one-half years. As a result, the company was forced to close one of its plants, laying off 200 employees. Green Bay Packaging Corporation, another one of the small *Corrugated Litigation* defendants, had resolved to vindicate its innocence at trial because it believed it had done nothing wrong. After other defendants settled, however, Green Bay, a family-owned business, was faced with the loss of its line of credit unless it resolved its contingent liability. To remain viable, Green Bay

[12]That the class action plaintiffs' settlement demands in the *Corrugated Litigation* increased as a direct result of the effect of the no-contribution, no-claim-reduction rule is indisputable. As early as December 1978, after only two defendants had settled and only days before the settlement stampede began, the district court rejected conditioning approval of the two settlements before it upon claim reduction. During December 1978 and January 1979, the time of the vast majority of the settlements, there was no significant change in circumstances, other than the impact of the denial of contribution rights on the damage exposure facing remaining defendants brought about with each settlement, that can explain the plaintiffs' ability to demand and obtain ever-increasing settlement amounts. Moreover, these settlements occurred before a single deposition had taken place in the litigation. Indeed, the only other significant event during that time period was the district court's division of the plaintiff class into two subclasses, but that occurrence further demonstrates the striking *in terrorem* effect of the absence of contribution rights, as defendants continued to pay higher and higher amounts even though their settlements, unlike earlier ones, did not settle claims of the entire plaintiff class.

had no choice but to accept plaintiffs' demand for $3.75 million per point. Plaintiffs threatened to increase this amount if settlement were delayed. As George Kress, the founder and president of Green Bay, stated:

> The effect of this extortive settlement practice upon a small, family-owned and managed business is catastrophic. We were threatened with the loss of over fifty years of effort, and coerced into paying an exorbitant settlement rather than being afforded the privilege of ultimately proving our corporate innocence.

Testimony of George Kress before United States Senate Judiciary Committee, Subcommittee on the Constitution. In the subsequent class action trial against The Mead Corporation, the jury found that neither U.S. Corrugated nor Green Bay had participated in the alleged conspiracy.[13]

Thus, before even one deposition had been taken in the *Corrugated Litigation,* twenty-four indicted and unindicted defendants collectively had paid more than $288 million in settlement during a brief, five-week period. Subsequent settlements brought the total amount paid to well more than $300 million, which has been said to be the largest settlement in the history of antitrust litigation.

The reason for such a settlement stampede is most dramatically reflected by the *Corrugated Litigation* trial judge's own observation, after personally supervising those settlement proceedings, that it was "indisputable" that the enormous damage exposure resulting from the absence of contribution

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[13]Other examples of settlement extortion abounded in the *Corrugated Litigation*. For example, The Continental Group, Inc., which was later acquitted in the companion criminal case, settled at a rate six and one-half times greater than the rate paid earlier by International Paper. Container Corporation of America was charged with a misdemeanor. Despite its having a market share virtually identical to International Paper's, it paid $34.2 million or more than four times the amount paid by felony-indictee International Paper.

"is inherently coercive," so that "[e]ven a defendant relatively certain of a judgment in his favor must have serious doubts about risking such exposure by going to trial."[14] This statement echoed similar concerns expressed by this and other courts about the coercive effects of the staggering damage exposure in antitrust and other large class action cases resulting in strong disincentive for defendants to contest antitrust claims against them.[15] Such settlements could not have been achieved by the plaintiffs were it not for the coercive effect of the no-contribution, no-claim-reduction rule that confronted each defendant with the Hobson's choice of risking potential multi-billion-dollar, industry-wide damages or capitulating to extortionate settlement demands.

Similarly, notwithstanding that the Houston grand jury had not implicated Georgia-Pacific in any way, the settlement terms offered to that defendant in the time period of the

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[14] 84 F.R.D. at 41.

[15] *See* Coopers & Lybrand v. Livesay, 437 U.S. 463, 476 (1978) ("Certification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense."); Reiter v. Sonotone Corp., 442 U.S. 330, 345-46 (1979) (Rehnquist, J., concurring); Kline v. Coldwell, Banker & Co., 508 F.2d 226, 234 (9th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975) (potential treble damage award of $750 million against a single defendant because of alleged joint and several liability in antitrust class action viewed as an "outrageous" amount that "would shock the conscience"); Hooley v. Red Carpet Corp. of America, 1975-1 Trade Cas. ¶ 60,285, at 66,112 (D. Ore. 1975), *appeal dismissed*, 549 F.2d 643 (9th Cir. 1977) (enormous risk of class-wide treble damage liability "may well result in some or all of the defendants opting for a settlement . . . whether they were guilty of the plaintiffs' allegations or not."). These same considerations that have led courts to question the propriety of class certification where it creates an enormous risk of damage exposure, carrying "to an absurd and stultifying extreme" the private enforcement remedies prescribed by Congress (Ratner v. Chemical Bank New York Trust Co., 54 F.R.D. 412, 414 (S.D.N.Y. 1972)), are equally applicable to the no-contribution rule. That rule likewise seeks not merely to impose punishment for a wrongdoer's "own malefactions . . . [but] to subject him to vicarious liability . . . for the staggering damages of the multitude . . . . At some point the logic of the law leads . . . to an ad absurdum result." Kline v. Coldwell, Banker & Co., 508 F.2d at 235.

settlement stampede and for a long period thereafter were, on a take-it-or-leave-it basis, the same escalating demands available to all unindicted defendants. For settlement negotiation purposes, the plaintiffs grouped the defendants into three classifications—felony-indicted defendants, misdemeanor-indicted defendants and unindicted defendants—and they refused to deviate from their increasing, multi-million-dollar "per point" demands established for members of each group. Consequently, unless it wished to capitulate to these extortionate demands, Georgia-Pacific, believing in and anxious to demonstrate its innocence, could only stand by and watch the potential multi-billion-dollar damage exposure confronting it escalate with each successive settlement. Moreover, avoidance of the inordinate burdens of defending such massive litigation at that stage other than by settlement was not possible, even for a defendant in Georgia-Pacific's position, as illustrated by the district court's curt denial of the motion for dismissal of the case against it filed by one of the other three *Corrugated Litigation* defendants that had not been indicted or alleged to be a coconspirator in the companion criminal cases.[16]

Only after the *Corrugated Litigation* class action cases had proceeded almost to the eve of trial, after more than a year of further extensive and costly pretrial proceedings including the Court of Appeals' denial of efforts to assert contribution

[16]That motion, requesting a dismissal without prejudice, was premised upon the undisputed ground that the company had been named as a defendant solely because it was a substantial member of the industry being investigated by the grand jury and because plaintiffs presumably were aware that it had received a subpoena *duces tecum* in the grand jury investigation. The district court ruled that, even in such circumstances, such a defendant could be forced to remain in the case while the plaintiffs searched for evidence of their then unsupported claim. The court stated:

> . . . Every day we deal with people that just come in and file a lawsuit and then decide they don't have any grounds for it, and my answer has been and always, I think, probably will be, well, that's just well and good, but let's engage in the discovery process and then if they can't find any facts, [the defendant can move to dismiss].

Transcript of Proceedings, In Chambers Conference, Feb. 2, 1979, at 56-57.

rights in that litigation, was a settlement offered to Georgia-Pacific that was reluctantly deemed acceptable, though extremely costly, in light of the risk of having to share with a handful of other companies the immense consequences of an unlikely, yet nonetheless possible, adverse judgment based upon the alleged wrongdoing of an entire industry.[17] The extraction of such multi-million-dollar settlements from such defendants, believing in their innocence but forced to forego a trial on the merits because of these unwarranted risks, is demonstrably unfair and unjust.

As the history of the *Corrugated Litigation* makes clear, the lack of contribution rights does not result in negotiation of settlements based upon a reasoned evaluation of the risks and merits of each party's case; rather, settlement amounts are

[17]Georgia-Pacific, along with two other defendants, agreed to pay a total of $3 million in order to settle the claims of the plaintiff class against them. Georgia-Pacific first entered the corrugated container industry in the early 1960's and its sales of corrugated products today amount to less than three percent of industry sales, with a substantial portion of the *Corrugated Litigation* defendants having larger market shares than Georgia-Pacific. Although the amount Georgia-Pacific agreed to pay was much less than that paid by many other defendants in the *Corrugated Litigation*, such an amount is still exorbitant where the payment is made for claims that are believed to be unfounded and are found as such by a jury. Nevertheless, such a settlement presented the opportunity for Georgia-Pacific to avoid the tremendous and ever-increasing costs of defense of the massive class action cases, including a several-month trial, and to protect against the potentially devastating, albeit extremely remote, risk of an adverse judgment in the class action trial.

The history of the *Corrugated Litigation* also demonstrates that the consequences of litigating rather than settling can be staggering to a defendant in the absence of established contribution rights. In the *Corrugated Litigation*, The Mead Corporation, the only defendant to go to trial through verdict in the class action cases, stands to bear the consequences of a potential judgment of close to $1 billion based on sales of twenty companies, even though Mead has a market share of less than three percent and was acquitted in the companion criminal litigation after only three hours of jury deliberation following a three-month trial. *See also* Olson Farms, Inc. v. Safeway Stores, Inc., 1979-2 Trade Cas. ¶ 62,995, at 79,700 (10th Cir. 1979)(Olson Farms, with only 11 percent market share, alone suffered $2.4 million judgment based on purchases of all five participants in alleged conspiracy).

related to the timing of other settlements and to the plaintiffs' ability to capitalize on a "game theory" that, though proved to be mathematically sound, bears none of the hallmarks of the justice that our courts are to dispense.[18]

II. Contribution Rights Are Particularly Appropriate for Antitrust Cases

The archaic approach prohibiting contribution has been repudiated in nearly every other area of the law,[19] and there is no sound reason for precluding adoption of such rules of fundamental fairness in antitrust cases. Indeed, the legitimate objectives of the antitrust laws are better served by allowing

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[18]In *In re Folding Carton Antitrust Litigation*, M.D.L. No. 250 (N.D. Ill.), the class action plaintiffs went so far as to retain an expert mathematician to support settlements in that litigation by expounding upon the virtues of their "game theory" of seriatim settlement negotiation to capitalize on the inherent harshness of the no-contribution rule to antitrust defendants. As this expert observed:

> [P]ursuit of such a strategy, absent special considerations such as ability to pay, will lead to an increasing series of relative settlements by each of the defendants. This is primarily due to the fact that as more individual settlements are made the maximum potential damages payable by each of the remaining non-settling defendants increases.

Affidavit of Martin Shubik, Dec. 4, 1978, at 2-3. Simply put, settlements are extracted not on the basis of the merits or lack of merits of the case against a particular defendant but rather as a direct consequence of the coercive effect of a rule of law that does not allow equitable apportionment of damages. Not coincidentally, Georgia-Pacific, one of the last defendants to settle in *Folding Cartons*, was compelled to pay a half-million dollars in settlement in that litigation even though, in the plaintiffs' own words, this company was "notable for its absence from any conspiratorial involvement...." In re Folding Carton Antitrust Litigation, M.D.L. No. 250 (N.D. Ill.), Memorandum of Class Plaintiffs in Support of the Proposed Settlements and Proposed Plan of Distribution, July 9, 1979, at 64.

[19]*See, e.g.*, Cooper Stevedoring Co. v. Fritz Kopke, Inc., 417 U.S. 106 (1974)(non-collision maritime case); Heizer Corp. v. Ross, 601 F.2d 330 (7th Cir. 1979)(securities law case); Glus v. G.C. Murphy Co., 629 F.2d 248 (3d Cir. 1980)(employment discrimination case); Kohr v. Allegheny Airlines, Inc., 504 F.2d 400 (7th Cir. 1974), *cert. denied*, 421 U.S. 978 (1975)(airline disaster litigation); Gomes v. Brodhurst, 394 F.2d 465 (3d Cir. 1968)(negligence case); Martello v. Hawley, 300 F.2d 721 (D.C. Cir. 1962)(negligence case).

contribution, which results in antitrust defendants' facing damage exposure for the consequences of their own acts. Because of the possiblilty of overdeterrence and the substantial disincentives defendants face in litigating antitrust actions on the merits, this Court should be extremely sensitive to impairment of basic rights brought about by denial of a contribution rule of fairness in antitrust litigation.

In this case, the Court of Appeals for the Fifth Circuit based its denial of contribution rights in part on its perception of the "chilling effect" of the "threatening specter of sole liability" that will cause businesses "necessarily [to] steer wide of any conduct the effects of which may violate the law, in the knowledge that full, trebled damages possibly await even an unintentional transgression." *Wilson P. Abraham Constr. Co. v. Texas Industries, Inc.*, 604 F.2d 897, 905 (5th Cir.), *en banc rehearing denied*, 608 F.2d 524 (1979), *petition for cert. granted sub nom. Texas Industries, Inc. v. Radcliff Materials, Inc.*, No. 79-1144, 49 U.S.L.W. 3321 (Nov. 3, 1980). To premise a no-contribution rule upon such reasoning, however, not only reflects a serious misconception of the antitrust laws but also conflicts with principles of antitrust enforcement enunciated by this Court.

In *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978), this Court cautioned against overdeterrence from a too-strict imposition of criminal sanctions for conduct that violates the antitrust laws:

> [T]he behavior proscribed by the [Sherman] Act is often difficult to distinguish from the gray zone of socially acceptable and economically justifiable business conduct. Indeed, the type of conduct charged in the indictment in this case—the exchange of price information among competitors—is illustrative in this regard. *The imposition of* criminal *liability* on a corporate official, or for that matter on a corporation directly, *for engaging in such*

> *conduct which only after the fact is determined to violate the statute because of anticompetitive effects,* without inquiring into the intent with which it was undertaken, *holds out the distinct possibility of overdeterrence;* salutary and procompetitive conduct lying close to the borderline of impermissible conduct might be shunned by businessmen who chose to be excessively cautious in the face of uncertainty regarding possible exposure to criminal punishment for even a good-faith error of judgment.

Id. at 440-41 (emphasis supplied)(footnote omitted).[20] These same concerns apply to treble damage civil litigation; indeed, potential treble damage exposure, when magnified even further by a denial of contribution rights, often dwarfs the sanctions that can be imposed for criminal antitrust violations and can result in equally improper overdeterrence. As the Court of Appeals for the Third Circuit recently warned, "the judiciary should not be hasty to allow the treble damage action to become so destructive a force, when Congress intended only that it be used as a weapon to enforce the antitrust laws.... [C]ourts have been wary of permitting 'overkill' recoveries, whose punitive impact may unduly cripple a defendant and lead to an overall deleterious effect on competition." *Mid-West Paper Prods. Co. v. Continental Group, Inc.*, 596 F.2d 573, 587 (3d Cir. 1979)(footnotes omitted).

As the supposed easy answer to the proponents of contribution rules in antitrust cases, it is often said that antitrust violators are intentional wrongdoers who need not be accorded fair treatment. *See, e.g., Wilson P. Abraham Constr. Co. v. Texas Indus., Inc.*, 604 F.2d 897, 900 & n.5, 905 (5th Cir. 1979);

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[20] As the Court noted:

> [W]here the conduct proscribed is difficult to distinguish from conduct permitted and indeed encouraged, as in the antitrust context, the excessive caution spawned by a regime of strict liability will not necessarily redound to the public's benefit. The antitrust laws differ in this regard from, for example, laws designed to insure that adulterated food will not be sold to consumers. In the latter situation, excessive caution on the part of producers is entirely consistent with the legislative purpose.

438 U.S. at 442 n.17.

Olson Farms, Inc. v. Safeway Stores, Inc., 1979-2 Trade Cas ¶ 62,995, at 79,701 (10th Cir. 1979), *en banc rehearing granted and pending* (Dec. 27, 1979). Numerous factors, however, including the concerns expressed by this Court in *Gypsum*, demonstrate that antitrust defendants are in fact entitled to fair treatment and should not blithely be prejudged and condemned, as opponents of contribution rules would do, as villainous perpetrators of "heinous" crimes against society who are undeserving of rules of fairness.[21]

Significantly, a denial of contribution rights reaches beyond those who clearly have violated the antitrust laws and dramatically affects the rights of defendants named in treble damage litigation who are innocent of the alleged violation or who are, at most, marginally culpable.[22] Such defendants, who may have been sued without any legitimate basis and nonetheless face the burdens of defending complex, protracted and exceedingly expensive litigation, are placed by a no-contribution, no-claim-reduction rule in the position of having to pay enormous amounts, unrelated to their conduct, to settle or risking the possibility, however slight it might be, of being subjected to a decimating judgment.[23]

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[21]The plaintiffs in the *Corrugated Litigation* thus offered numerous epithets to describe the alleged conduct of defendants in that case. *See, e.g.*, In re Corrugated Container Antitrust Litigation, No. 79-2439 (5th Cir.), Brief for Plaintiffs-Appellees at 20 ("[a] scheme to bilk corrugated container consumers of billions of dollars"); at 22 (contribution would "give relief to the conspirators who deliberately engaged in price-fixing schemes to injure the nation's free market economy"); at 26 (claim reduction is not fair "to the innocent victims of defendants' heinous acts").

[22]Particularly in antitrust conspiracy cases, the possibility of liability for very minimal involvement in the alleged wrongful conduct exists and proof in such cases is often largely circumstantial and based on inference. *See, e.g.*, United States v. Consolidated Packaging Corp., 575 F.2d 117, 126-27 (7th Cir. 1978).

[23]Clearly "false [is] the notion that every antitrust defendant, without exception, is guilty as charged in a private complaint." Handler, *The Shift From Substantive to Procedural Innovations in Antitrust Suits—The Twenty-Third Annual Anti-Trust Review*, 71 Columbia L. Rev. 1, 9 (1971).

Deference to the deterrence objectives of the federal antitrust laws already has led to stated judicial reluctance to permit any impediment to possibly meritorious private antitrust claims by the granting of summary pretrial rulings.[24] As a result, naming defendants in a blunderbuss fashion is now commonplace so that the marginally culpable and innocent are forced to defend such cases. As dramatically illustrated by the settlement history of the *Corrugated Litigation*, a denial of contribution and claim-reduction rights has tipped the balance of litigation advantage so far to the side of treble damage plaintiffs and so far against such defendants that, although settlements are the inevitable result, such compromises legitimately cannot be described as fair or desirable. As this Court observed in *United States v. Reliable Transfer Co.*, 421 U.S. 397, 408 (1975): "[A] rule of fairness in court will produce fair

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[24]Summary pretrial adjudications in antitrust cases are strongly disfavored. *E.g.*, Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 473 (1962); *see* pp. 11-12 *supra*. This principle graphically illustrates the practical burdens that are placed upon a company simply because it has been named as a defendant in treble damage litigation, even if the charges against it are totally baseless. For example, in *Folding Cartons, Inc. v. American Can Co.*, No. 76C1113 (N.D. Ill.), a magistrate, after hearing, found that a group of defendants, including Georgia-Pacific, had been joined almost two years after the original complaint was filed simply as a tactical ploy to seek to overcome an objection to the adequacy of the plaintiff's class representation because it had not initially sued all of its suppliers of the product in question. The magistrate found it undisputed that "neither plaintiff nor his attorney could have held an honest belief that there were good grounds to support antitrust claims against these six defendants." Memorandum in Support of Report and Recommendation on Certain Defendants' Motions to Dismiss, July 27, 1979, at 13-16; *see* Fed. R. Civ. P. 11. Nevertheless, the district court in that case rejected the magistrate's recommendation to dismiss the complaint without prejudice. The court concluded that even that limited relief was not appropriate because the complaint was "neither demonstrably false nor preposterous on [its] face." Slip Op., June 16, 1980, at 2. Even though there was "virtually nothing to suggest that any kind of review of the pricing practices of these defendants was pursued before they were embroiled in the litigation" (*id.* at 4), the court left the defendants only the hollow hope of seeking sanctions if the plaintiff's allegations later proved to be without substance.

out-of-court settlements."[25] The unfairness of the absence of contribution rights, on the other hand, quite clearly causes the kind of settlements that should not be fostered.[26]

In addition to the wrongly accused, even those defendants who have actually violated the antitrust laws may not properly be classified as a group of litigants who do not deserve judicial rules of fairness. Undeniably, antitrust violations can strike substantial blows to our economic system, and certain antitrust violations, carried out with the requisite state of mind, can subject the violators to serious criminal penalties. 15 U.S.C. §§ 1, 2; *see United States v. United States Gypsum Co.*, 438 U.S. 422, 434-46 (1978). Nevertheless, it is widely recognized that antitrust law is one of the most complex, changeable and uncertain areas of substantive law in American jurisprudence. As this Court has stated: "The Sherman Act... does not, in clear and categorical terms, precisely identify the conduct which it proscribes.... Nor has judicial elaboration of the Act always yielded the clear and definitive rules of conduct

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[25]Promoting a denial of contribution rights as a means to induce compromise of litigation ignores the principles of fairness and justice that undergird such rights,

> [f]or, at bottom, it asks us to continue the operation of an archaic rule because its facile application out of court yields quick, though inequitable, settlements, and relieves the courts of some litigation. Congestion in the courts cannot justify a legal rule that produces unjust results in litigation simply to encourage speedy out-of-court accommodations.

421 U.S. at 408.

[26]The *Corrugated Litigation* provides but one example of the kinds of litigation abuse engendered by a denial of contribution rights. A no-contribution, no-claim-reduction rule just as clearly can legitimatize selective private enforcement of the antitrust laws based upon considerations such as the treble damage plaintiff's whim or collusion with others, as exhibited by the plaintiff's decision in this case to sue only Texas Industries, which was just one of four companies indicted for the alleged antitrust violation in question. *See also* Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179, 1185-86 (8th Cir. 1979), *en banc rehearing denied* (Apr. 17, 1979).

which the statute omits. . . ." *United States v. United States Gypsum Co.*, 438 U.S. 422, 438 (1978). *See also Sugar Institute, Inc. v. United States*, 297 U.S. 553, 600 (1936).

The relative costs and benefits to our economy resulting from conduct that may run afoul of the antitrust laws are frequently difficult to discern and often are hotly debated.[27] Moreover, the amount and impact of damages that may flow from anticompetitive conduct, particularly allegedly supra-competitive prices, are especially difficult to ascertain.[28] Even in cases of so-called "price-fixing," which has long been held to be *per se* unlawful, the borderline between what is and what is not unlawful under this *per se* rule often is extremely obscure.[29] Accordingly, as this Court recognized in *Gypsum*, the inherent uncertainty of the standards of illegality and of the consequences flowing from conduct proscribed under the antitrust laws does not permit easy categorization of such conduct as right or wrong.

In fact, the historical genesis of the *Corrugated Litigation* provides an example of such uncertainties and demonstrates the obscurity of the line of demarcation between right and wrong under the antitrust laws, even in horizontal price-fixing cases. Thus, the kind of conduct that has formed the core of plaintiffs' claims in the *Corrugated Litigation* is the alleged exchange of price information among competitors. Such conduct is not unlawful *per se* as it "does not invariably have

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[27] *See, e.g.*, Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 47-59 (1977); Appalachian Coals, Inc. v. United States, 288 U.S. 344, 360-61, 375-77 (1933).

[28] *See* Illinois Brick Co. v. Illinois, 431 U.S. 720, 731-33, 736-45, *rehearing denied*, 434 U.S. 881 (1977); Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 263-66 (1946); Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 562-66 (1931).

[29] *See, e.g.*, Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1, 7-9, 13 & n.24 (1979), *on remand*, 620 F.2d 930 (2d Cir. 1980).

anticompetitive effects." *United States v. United States Gypsum Co.*, 438 U.S. 422, 441 & n.16 (1978). Under a 1940 consent decree entered into by many members of the corrugated container industry long before Georgia-Pacific and certain other *Corrugated Litigation* defendants entered that industry, certain forms of communication of price information between competitors, including exchanges of past and certain current price information, were permitted and hence presumably were believed to be acceptable under the antitrust laws. *United States v. National Container Ass'n*, 1940-1943 Trade Cas. ¶ 56,028, at 85-86 (S.D.N.Y. 1940); *see United States v. Container Corp. of America*, 273 F. Supp. 18, 28-30 (M.D.N.C. 1967). Then, in proceedings leading up to this Court's decision in *United States v. Container Corp. of America*, 393 U.S. 333 (1969), the Government first empaneled a grand jury to investigate these practices and then filed a civil injunction suit alleging an unlawful "price-fixing" agreement based upon, *inter alia*, such exchanges of price information in this industry. That proceeding resulted in a district court determination that the conduct in question was not unlawful; in the *Container* decision, however, this Court concluded, with three Justices dissenting, that such conduct violated section 1 of the Sherman Act. In the *Corrugated Litigation*, the plaintiffs, embracing the findings and rulings of this Court in *Container* and seeking damages for sales by defendants as far back as the early 1960's, have sought in part to impose treble damage liability on defendants for conduct of more than a decade ago even though that conduct first was believed possibly to be unlawful only after a landmark decision of this Court years after the conduct took place.

In sum, it is no answer to the problem of unfair treatment resulting from a denial of contribution rights to say that the class of persons to be protected, that is, antitrust defendants, are such "wrongdoers" that they simply do not deserve fair treatment. To the contrary, their fair treatment by adoption of a contribution rule not only is appropriate because of the

nature of the antitrust laws but also because that rule of fairness will foster proper deterrence of antitrust violations.[30]

Significantly, contribution will result in punishment of the most culpable antitrust violators. The motivations for selective private enforcement of the antitrust laws have been exhibited in this and other recent antitrust cases in which contribution rights were sought.[31] Without contribution rights to apportion

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[30]Private antitrust remedies, like private enforcement tools in the securities laws, are designed to serve essentially the same goals of deterrence and providing an incentive to institute private enforcement actions. Contribution has been found to serve such purposes well under the securities laws, even for "intentional" violations. *E.g.*, Heizer Corp. v. Ross, 601 F.2d 330 (7th Cir. 1979); Globus, Inc. v. Law Research Service, Inc., 318 F. Supp. 955 (S.D.N.Y. 1970), *aff'd*, 442 F.2d 1346 (2d Cir.), *cert. denied*, 404 U.S. 941 (1971). A report of the Section of Antitrust Law of the American Bar Association recently observed:

> [M]any antitrust suits do not involve "intentional" behavior in the usual sense of that word.... The case law is replete with examples of good faith efforts to comply with the antitrust laws that were later held unlawful. [*citing United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967); *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972); *Simpson v. Union Oil Company*, 377 U.S. 13 (1964).] Finally the existence of "intention" is itself a somewhat elusive concept, particularly when applied in the context of vicarious employer liability for the acts of employees. Antitrust defendants are often companies whose employees are alleged to have committed intentional acts which violate company policy as much as they violate the antitrust laws. Whatever the wisdom of making an employer strictly liable for civil injuries in such circumstances, under no rational scheme of analysis can it be said that such injuries are the product of the "intentional" tort of the company.

American Bar Ass'n, Section of Antitrust Law, *Resolution and Report of the Section of Antitrust Law of the American Bar Association on Proposed Amendment of the Clayton Act to Permit Contribution in Damage Actions Brought Thereunder*, Aug. 17, 1979, at 6-7.

[31]*E.g.*, Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179, 1185 (8th Cir. 1979)(recognizing potential, as alleged in that case, for large or powerful violator to exert economic influence to keep plaintiff from seeking damages from it); Olson Farms, Inc. v. Safeway Stores, Inc., 1979-2 Trade Cas. ¶ 62,995, at 79,706 (10th Cir. 1979) (Holloway, Cir. J., concurring and dissenting) (recognizing the "potential of a plaintiff deliberately choosing to sue a less formidable, but financially responsible defendant, and avoiding litigation with other equally culpable parties").

liability, moreover, the most culpable wrongdoers are not properly deterred because, even if sued, they can seek early sweetheart settlements, enabling them to retain much of the fruits of their unlawful conduct while shifting the burden of damage liability for their conduct onto the less culpable or innocent defendants. Treble damage plaintiffs are encouraged to capitalize on the bargain nature of such defendants' settlements while retaining virtually the entirety of their claims to press against remaining defendants, aided by the inherently coercive nature of the increases in damage exposure resulting from the early settlements.

Thus, a no-contribution, no-claim-reduction rule, which has been exhorted largely as a rule designed to promote deterrence of wrongdoing *(e.g., Wilson P. Abraham Constr. Co. v. Texas Industries, Inc.,* 604 F.2d 897, 901, 905-06 (5th Cir. 1979)), in fact turns the deterrence objective of the antitrust laws on its head. Under such a rule, the most culpable violators, because of factors wholly extraneous from considerations of who is most deeply at fault, can get off "scot free" or, at most, having to disgorge only a small part of their gains from their unlawful conduct. The largest exaction of damages, by trial or settlement, is left for the less culpable or innocent defendants, whose involvement in the unlawful conduct may have been only peripheral or nonexistent. A court-made rule of law can thus be turned into a tool for collusion, coercion and unfairness. Contribution rights, on the other hand, ensure that antitrust violators cannot escape or substantially limit treble damage liability. Even-handed deterrence that properly reflects the goals of private antitrust enforcement is achieved by contribution. Fair apportionment of damage liability "imposes the strongest deterrent upon the wrongful behavior that is most likely to harm others." *United States v. Reliable Transfer Co.,* 421 U.S. 397, 405 n.11 (1975).

III. Contribution and Claim Reduction Promote Fairness in Antitrust Litigation

Contribution principles are rules of equity designed to promote fairness and justice. Many courts, including this Court, have sought to achieve the paramount objective of fairness in litigation by adopting rules of contribution, recognizing that any other rule is simply unfair and unjust. As this Court stated in *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S. 106 (1974):

> [A] "more equal distribution of justice" can best be achieved by ameliorating the common-law rule against contribution which permits a plaintiff to force one of two wrongdoers to bear the entire loss, though the other may have been equally or more to blame.

Id. at 111, *quoting The Max Morris*, 137 U.S. 1, 14 (1890).[32]

Georgia-Pacific and PCA firmly believe that contribution will in fact enhance deterrence of wrongdoing and will promote the other objectives of private enforcement of the antitrust

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[32] *See also* Glus v. G.C. Murphy Co., 629 F.2d 248, 252 (3d Cir. 1980) ("It is now widely recognized that fundamental fairness demands a sharing of the liability."); Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179, 1185 (8th Cir. 1979) ("There is an obvious lack of sense and justice in a rule which permits the entire burden of restitution of a loss for which two parties are responsible to be placed upon one alone. . . ."); Heizer Corp. v. Ross, 601 F.2d 330, 332 (7th Cir. 1979) (contribution results in a "'more equal distribution of justice'"); Kohr v. Allegheny Airlines, Inc., 504 F.2d 400, 405 (7th Cir. 1974), *cert. denied*, 421 U.S. 978 (1975) (there is an "obvious lack of sense and justice" in a no-contribution rule); Gomes v. Brodhurst, 394 F.2d 465, 467 (3d Cir. 1968) (contribution is "a rule of reasoned fairness").

As the Court of Appeals in *Gomes*, adopting contribution in the settlement context, observed:

> There is no longer a legitimate place in our system, if, indeed, there ever was, for a rule of law which places the full burden of restitution upon one who is only in part responsible for a plaintiff's loss. Such a philosophy stems from a more ancient day which more easily intermingled penal and compensatory considerations.

394 F.2d at 467-68.

laws. Nevertheless, in the final analysis, it is, and should be, the judicial sense of fairness, equity and justice that counsels most compellingly for adoption of contribution in the antitrust arena just as in other substantive fields of the law. "The deciding factor...is fairness between the parties." *Professional Beauty Supply, Inc. v. National Beauty Supply, Inc.*, 594 F.2d 1179, 1185 (8th Cir. 1979). *See also Heizer Corp. v. Ross*, 601 F.2d 330, 333 (7th Cir. 1979).

Implementing the "equal distribution of justice" brought about by contribution necessarily requires appropriate application of that rule in a manner that will not unfairly impact upon the settlement process, for it would make no sense to adopt a rule of fairness as between defendants that would operate unfairly as to settling defendants. Even though the case now before the Court does not involve settlements, Georgia-Pacific and PCA do not believe this Court should address the contribution issue without considering the means for its implementation where settlements have been reached. Claim reduction allows the implementation of the equitable doctrine of contribution in a manner that preserves the essential underpinning of that doctrine—the fair apportionment of liability among joint wrongdoers—while eliminating the oft-stated concern that contribution would impede compromise of litigation. Hence, although claim reduction is not directly before the Court in this litigation, it should be a highly pertinent consideration in this Court's deliberations over the contribution issue.

Claim reduction, or a proportionate reduction of a plaintiff's claim against nonsettling defendants to reflect the portion of the plaintiff's claim he has settled with jointly and severally liable codefendants, is an equitable rule of contribution that has been applied in the settlement context and is an essential part of a contribution rule for antitrust cases involving alleged joint wrongdoing. Under this equitable contribution rule, the plaintiff's claim is adjusted to reflect his partial settlement of

that claim and nonsettling defendants' contribution claims against settling defendants are satisfied. In this way, all parties are accorded fair treatment: settling defendants are relieved of exposure to contribution claims, nonsettling defendants are not forced to shoulder an inordinate exposure to damages swollen solely by reason of the fact that codefendants have settled, and the plaintiff "cannot complain of unfairness, since '. . .the reduction would be a direct result of his own act in accepting less than [the settler's *pro rata* share of] the total recoverable damages in settlement with the compromising wrongdoer.'" *Judson v. Peoples Bank & Trust Co.*, 17 N.J. 67, 93, 110 A.2d 24, 37 (1954) (Brennan, J.), *quoting McKenna v. Austin*, 134 F.2d 659, 666 (D.C. Cir. 1943).[33]

In other substantive areas of the law in which contribution rights have been applied, courts have properly balanced the principles of contribution and compromise through claim reduction. In *Gomes v. Brodhurst*, 394 F.2d 465 (3d Cir. 1968), for example, the Court of Appeals for the Third Circuit held that the plaintiff's judgment against a non-settling defendant was to be reduced by an amount that reflected the settling tortfeasor's respective share of fault. *Id.* at 468-69.[34] As the court in *Gomes* recognized, this rule was designed to implement "a system which provides for the equitable distribution of liability for joint fault and yet encourages out-of-court settle-

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[33] *See also* Gomes v. Brodhurst, 394 F.2d 465, 467-70 (3d Cir. 1968); Martello v. Hawley, 300 F.2d 721, 724 (D.C. Cir. 1962); Palestine Contractors, Inc. v. Perkins, 386 S.W.2d 764, 767-68 (Tex. 1964).

[34] Claim reduction in *Gomes* was viewed as the proper resolution of the issue of the "extent, if at all, [to which] the judgment against appellant [should] be reduced to reflect any right of contribution he might have." 394 F.2d at 467. The court approached this issue of Virgin Islands common law with full recognition that the result "should be consistent with the long-standing policy considerations underlying any system of contribution: the encouragement of voluntary settlements, the equitable distribution of liability among joint tortfeasors, and the elimination or minimization of collusion." *Id.*

ments.... The fairness of such a system is evident." *Id.* at 468. Similarly, in *Martello v. Hawley*, 300 F.2d 721 (D.C. Cir. 1962), the court concluded that claim reduction was the most sensible means of reconciling the possible conflict between the inherent justice of the contribution doctrine and the injured party's right to settle its claim with less than all of the parties who have caused him harm. *Id.* at 723-24. Fairness to all litigants was the court's paramount objective.[35]

In *Judson v. Peoples Bank & Trust Co.*, 17 N.J. 67, 110 A.2d 24 (1954), the court, by Mr. Justice Brennan (then a Justice of the Supreme Court of New Jersey), used judicial claim reduction to achieve the "basic purpose" of New Jersey's contribution law: "to achieve the 'sharing of the common responsibility according to equity and natural justice'...." *Id.* at 92, 110 A.2d at 36, *quoting Sattelberger v. Telep*, 14 N.J. 353, 367, 102 A.2d 577, 584 (1954).[36] Claim reduction was found to be "clearly preferable" to "'blend the themes of compromise and contribution'":

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[35]As the court stated:

> It is true that in a case like the present one, where the verdict figure is in excess of twice the settlement figure, the application of this formula will necessarily reduce the amount of the injured plaintiff's recovery. However, the answer to objection to the formula on this account is that, by his settlement, the plaintiff has sold one-half of his claim for damages. Anything else would be unfair to the settling tort-feasor, who has bought his peace, and unfair to the defendant tort-feasor, who should not be disadvantaged by a settlement to which he was not a party and to which he did not consent.

300 F.2d at 724 (footnote omitted). *See also* Leger v. Drilling Well Control, Inc., 592 F.2d 1246, 1250 (5th Cir. 1979)("Whether the plaintiff obtains a favorable or unfavorable settlement, he may only recover once for each wrongdoer's percentage of fault."); Doyle v. United States, 441 F. Supp. 701, 712 n.5 (D.S.C. 1977)(nonsettling defendant should receive equitable reduction of verdict based upon settling defendant's proportionate share of total damages).

[36]The wrongful conduct involved in *Judson* was fraud, an intentional tort, to which the court held that New Jersey's contribution rules should apply. 17 N.J. at 87-91, 110 A.2d at 32-36; *see* pp. 19-22 *supra*.

> Collusive settlements are wholly ineffective when a credit of the settler's *pro rata* share is the required result of any settlement, and this helps attain one of the objectives of the contribution statute. And, thereby the settling tortfeasor is assured of the finality of his settlement, and impairment of the public policy favoring compromise is avoided. The injured party should not be discouraged from settlement by such a rule. He cannot complain of unfairness, since ". . . the reduction would be a direct result of his own act in accepting less than [the settler's *pro rata* share of] the total recoverable damages in settlement with the compromising wrongdoer." *McKenna v. Austin*, [134 F.2d 659 (D.C. Cir. 1943)] *supra*. Thus, if the settlement is not collusive, he makes it upon the basis of his own appraisal of the risks of recovery and will hardly be deterred from it because it may later eventuate that he accepted less than the settler's *pro rata* share.

Id. at 93, 110 A.2d at 36-37.

The courts that have adopted claim-reduction rules have, as illustrated by the foregoing cases, sought to apply that contribution rule of fairness by carving out a proportionate share of the injured party's claim because of a partial settlement of that claim. In horizontal-restraint-of-trade cases, claim reduction based upon reduction of the plaintiffs' claim by an amount proportionately related to the settling defendants' sales of the products in question is a fair rule that would not increase the complexity of the litigation. In *Little Rock School District v. Borden, Inc.*, 1980-1 Trade Cas. ¶ 63,059 (E.D. Ark. 1979), a district court applying the directive of the Court of Appeals for the Eighth Circuit to "fashion a rule of contribution which will protect the rights of settling defendants"[37] found claim reduction by elimination of claims based

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[37]Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179, 1184 (8th Cir. 1979).

upon settling defendants' sales to be "the only possible viable alternate" in that horizontal price-fixing case. *Id.* at 77,252.

In such cases, the gains from higher-than-competitive prices are reaped by the wrongdoers on the basis of their relative shares of total sales of the product affected by their conduct.[38] Apportionment of liability on that basis, therefore, provides a fair approximation of each participant's gain from the conduct. Claim reduction on this basis also is free of administrative difficulties, because market shares are readily determinable and, if not the subject of a stipulation or otherwise to be found for purposes of the case, could be determined by the factfinder. Thus, such application of contribution rights brings about a fair treatment of all litigants while not undermining the goal of efficient management of antitrust litigation.

Moreover, such a rule will not discourage fair settlements. If parties wish to settle, they will do so. But they will do so on the basis of their assessment of the strengths and weaknesses of the claims and defenses involved, just exactly as they do in litigation that does not involve claims against multiple defendants. Only the demonstrated unfairness and realized opportunity for abuse brought about by a denial of contribution rights will be removed from the settlement process. This Court's sense of justice certainly should require no less.

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[38]In the *Corrugated Litigation*, the class action plaintiffs' entire settlement strategy was based upon settlement amounts demanded "per point" of each defendant's market share. Settlements were evaluated, negotiated and justified to the court as fair and reasonable on the basis of plaintiffs' calculations of each defendant's market share. *See* pp. 7-14 *supra*.

CONCLUSION

For all the foregoing reasons, Georgia-Pacific Corporation and Packaging Corporation of America respectfully submit that this Court should reverse the decision of the Court of Appeals for the Fifth Circuit and adopt an appropriate rule of contribution for antitrust cases.

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No. 79-1144

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

TEXAS INDUSTRIES, INC.,
Petitioner,

v.

RADCLIFF MATERIALS, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF AMICUS CURIAE THE MEAD CORPORATION IN SUPPORT OF PETITIONER TEXAS INDUSTRIES, INC.

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENT	4
ARGUMENT	5
I. THE RIGHT TO CONTRIBUTION AMONG DEFENDANTS IN ANTITRUST CASES SHOULD BE RECOGNIZED BY THIS COURT	5
II. CONTRIBUTION IN ANTITRUST CASES WOULD ELIMINATE SETTLEMENT COERCION SUCH AS THAT WHICH OCCURRED IN THE CORRUGATED CONTAINER ANTITRUST LITIGATION	8
A. The Settlement History	8
B. The Settlements Were Extortionate	12
III. CONTRIBUTION IN ANTITRUST CLASS ACTIONS WOULD PREVENT THE MISUSE OF RULE 23 OF THE FEDERAL RULES OF CIVIL PROCEDURE	16
CONCLUSION	23

TABLE OF AUTHORITIES

CASES Page

Alsup v. *Montgomery Ward & Co.*, 57 F.R.D. 89 (N.D. Cal. 1972) 15
Arth Main Street Drugs v. *Beer Distributors, Inc.*, 26 F.R. Serv. 2d 87 (N.D. Ind. 1978) 15
Cackling Acres, Inc. v. *Olson Farms, Inc.*, 541 F.2d 242 (10th Cir. 1976), *cert. denied*, 429 U.S. 1122 (1977) 6
City of Detroit v. *Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974) 8
City of Philadelphia v. *American Oil Co.*, Civ. No. 647-68 (D.N.J. 1971) 20
Cooper Stevedoring Co. v. *Fritz Kopke, Inc.*, 417 U.S. 106 (1974) 5
Coopers & Lybrand v. *Livesay*, 437 U.S. 463 (1978) 16
Edmonds v. *Compagnie Generale Transatlantique*, 443 U.S. 256 (1979) 5
Eisen v. *Carlisle & Jacquelin*, 391 F.2d 555 (2d Cir. 1968) 17
Eisen v. *Carlisle & Jacquelin*, 479 F.2d 1005 (2d Cir. 1973), *vacated and class action dismissed on other grounds*, 417 U.S. 156 (1974) 21
Glus v. *G.C. Murphy Co.*, 629 F.2d 248 (3d Cir. 1980) 5, 6
Gomes v. *Brodhurst*, 394 F.2d 465 (3d Cir. 1967) .. 7
Hawaii v. *Standard Oil Co.*, 405 U.S. 251 (1972) .. 22
Heizer Corp. v. *Ross*, 601 F.2d 330 (7th Cir. 1979) 5
Hooley v. *Red Carpet Corp. of America*, 1975 Trade Cas. ¶ 60,285 (D. Ore. 1975), *appeal dismissed*, 549 F.2d 643 (9th Cir. 1977) 15, 16
In re Corrugated Container Antitrust Litigation, 80 F.R.D. 244 (S.D. Tex), *mandamus denied*, No. 78-3684 (5th Cir. December 29, 1978) 2
Judson v. *Peoples Bank & Trust Co.*, 17 N.J. 67, 110 A.2d 24 (1954) 7
Kline v. *Coldwell, Banker & Co.*, 508 F.2d 226 (9th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975) 14, 16, 17

TABLE OF AUTHORITIES—Continued

Page

Kohr v. *Allegheny Airlines, Inc.*, 504 F.2d 400 (7th Cir. 1974), *cert. denied*, 421 U.S. 978 (1975) 5, 6
Little Rock School District v. *Borden, Inc.*, 1980-1 Trade Cas. ¶ 63,059 (E.D. Ark. 1979) 7
Mead Corp. v. *Alton Box Board Co.*, Civ. No. 4-79-245 (D. Minn. 1979) 3
Mid-West Paper Products Co. v. *Continental Group, Inc.*, 596 F.2d 573 (3d Cir. 1979) 11, 16
Olson Farms, Inc. v. *Safeway Stores, Inc.*, 1977-2 Trade Cas. ¶ 61,698 (D. Utah 1977), *aff'd*, 1979-2 Trade Cas. ¶ 62,995 (10th Cir. 1979) 6
Professional Beauty Supply, Inc. v. *National Beauty Supply, Inc.*, 594 F.2d 1179 (8th Cir. 1979) 6, 7
Reiter v. *Sonotone Corp.*, 442 U.S. 330 (1979) 16
Shapiro v. *General Motors Corp.*, 472 F. Supp. 636 (D. Md. 1979) 14, 15
Smith v. *Beneficial Finance Co.*, Civ. Nos. 860-71, 861-71, 862-71 (D.N.J. 1971) 17
Snyder v. *Harris*, 394 U.S. 332 (1969) 21
United States v. *Indrelunas*, 411 U.S. 216 (1973) .. 3
United States v. *Reliable Transfer Co.*, 421 U.S. 397 (1975) 5
Wassel v. *Eglowsky*, 399 F. Supp. 1330 (D. Md. 1975), *aff'd*, 542 F.2d 1235 (4th Cir. 1976) 5
Wilson P. Abraham Construction Corp. v. *Texas Industries, Inc.*, 604 F.2d 897 (5th Cir. 1979), *cert. granted sub nom. Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, No. 79-1144 (1980) 3, 23

STATUTE

Clayton Act, 15 U.S.C. § 15 ..... 16, 21

FEDERAL RULES OF CIVIL PROCEDURE

Fed. R. Civ. P. 23 ..... 2, 4, 14, 16, 17, 21
Fed. R. Civ. P. 54(b) 3
Fed. R. Civ. P. 58 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 79-1144

TEXAS INDUSTRIES, INC.,
Petitioner,

v.

RADCLIFF MATERIALS, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF AMICUS CURIAE THE MEAD CORPORATION IN SUPPORT OF PETITIONER TEXAS INDUSTRIES, INC.

The Mead Corporation ("Mead") submits this brief as amicus curiae in support of petitioner Texas Industries, Inc.[1] Mead respectfully submits that this Court should hold that defendants may assert rights of contribution and claim reduction in antitrust cases.

INTEREST OF AMICUS CURIAE

Mead is one of 37 corrugated container manufacturers named as defendants in one or more of over 60 treble damage antitrust class and nonclass actions alleging a nationwide conspiracy to fix the prices of corrugated containers and sheets in the *Corrugated Container*

[1] Counsel for petitioner and counsel for respondents have consented in writing to the filing of this amicus curiae brief. The written consents of all parties to this case are being filed concurrently with this brief pursuant to Rule 36.2 of the Rules of the United States Supreme Court.

Antitrust Litigation, M.D.L. 310 (S.D. Tex.). Mead is the only defendant in M.D.L. 310 which did not settle the class action cases. On September 3, 1980, after a three month trial, a jury returned an adverse verdict to Mead, although no final judgment has yet been entered. Without rights of contribution or claim reduction, plaintiffs claim that Mead, having approximately 2½% of the market, is nevertheless liable in M.D.L. 310 on the basis of industry-wide sales.

On September 6, 1978, the district court in M.D.L. 310, purportedly under Rule 23 of the Federal Rules of Civil Procedure, certified a national class of all purchasers of corrugated containers or corrugated sheets from defendants from January 1, 1960 to January 25, 1978, estimated to include 300,000 members. *In re Corrugated Container Antitrust Litigation*, 80 F.R.D. 244 (S.D. Tex.), *mandamus denied*, No. 78-3684 (5th Cir. Dec. 29, 1978).

Thereafter, and as a direct result of that class certification, plaintiffs in M.D.L. 310 engaged in an unprecedented five-week settlement "stampede" from late December 1978 to January 1979, which resulted in 24 defendants collectively paying more than $288 million in 22 separate settlements. With each successive settlement, plaintiffs demanded and received amounts at a higher rate than prior settlements without regard to the merits of their claims. Plaintiffs were able to escalate their settlement demands by refusing to remove the sales of settling defendants from the litigation. As a result, plaintiffs threatened each remaining nonsettling defendant with exposure to damage claims based upon the sales of each settling defendant.

In M.D.L. 310, three defendants filed motions to assert cross claims for contribution and an affirmative defense of claim reduction. On May 16, 1979, the district court denied the motions. On October 30, 1979, the Court of Appeals for the Fifth Circuit summarily affirmed the

district court's denial of the motions for contribution and dismissed the appeals with respect to claim reduction. The court, without analysis, accepted as controlling authority its decision in *Wilson P. Abraham Construction Corp.* v. *Texas Industries, Inc.*, 604 F.2d 897 (5th Cir. 1979), *cert. granted sub nom. Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, No. 79-1144 (1980), in which the Fifth Circuit held that there were no rights of contribution for antitrust defendants.

Mead has a vital and legitimate interest in the issue of contribution among antitrust defendants and in the outcome of this appeal. Mead has asserted, and continues to seek, rights to contribution in its complaint filed on May 21, 1979 in the District Court for the District of Minnesota, *The Mead Corporation* v. *Alton Box Board Co.*, Civ. No. 4-79-245. The Judicial Panel on Multidistrict Litigation transferred Mead's complaint to the Southern District of Texas for consolidation in M.D.L. 310 (Civ. No. H-79-1436). While the district court on December 21, 1979 filed an opinion dismissing Mead's claim for contribution, no final judgment has ever been entered dismissing Mead's complaint, as required by either Rule 58 or Rule 54(b) of the Federal Rules of Civil Procedure. *See United States* v. *Indrelunas*, 411 U.S. 216 (1973). On January 3, 1980, Mead filed a motion for reconsideration and on January 21, 1980, plaintiffs filed their objections to the motion. The district court has never ruled on that motion. Thus, no final and separate judgment has yet been entered by the district court from which Mead can appeal.

In M.D.L. 310, Mead also filed a motion to amend its answer to assert the affirmative defense of claim reduction, which is a mechanism to implement contribution where there have been settlements with plaintiffs by some, but not all, defendants. The district court initially denied Mead's motion as premature prior to the jury verdict, but at that time did not enter a final and sepa-

rate judgment. Following the jury verdict, the district court, on December 1, 1980, denied Mead's motion for claim reduction, but no final judgment has yet been entered.

SUMMARY OF ARGUMENT

The *Corrugated Container Antitrust Litigation*, M.D.L. 310, not only represents one of the largest antitrust cases in history, but also represents the most egregious abuse of the class action device to date. The absence of rights of contribution and claim reduction among antitrust defendants has resulted in coercive escalation settlement tactics by plaintiffs and a blatant perversion of Rule 23 of the Federal Rules of Civil Procedure. The escalation settlements extracted by plaintiffs in M.D.L. 310 conclusively demonstrate the fundamental necessity for rights of contribution and claim reduction in antitrust cases. In the absence of such rights, an innocent defendant is relegated to the unacceptable choice of trying a lawsuit with potential multimillion dollar damage exposure or agreeing to an extortionate settlement on a take it or leave it basis.

Rights of contribution and claim reduction among antitrust defendants will (1) eliminate the manifest unfairness of coercive escalation settlements to nonsettling defendants, (2) prevent the most culpable defendants from escaping significant liability through "sweetheart" settlements, and (3) increase the deterrence of the antitrust laws. Recognition of rights of contribution and claim reduction among antitrust defendants would proportion liability and ultimately damages to relative market size and other legitimate factors. The settlement process would not be exploited by coercion, and settling and nonsettling defendants alike would not be victimized by the happenstance of a successive escalation settlement timetable. The confluence of joint and several liability, class certification, and treble damages compels that rights of contribution and claim reduction be recognized in antitrust cases.

ARGUMENT

I. THE RIGHT TO CONTRIBUTION AMONG DEFENDANTS IN ANTITRUST CASES SHOULD BE RECOGNIZED BY THIS COURT.

This Court should recognize rights of contribution and claim reduction in antitrust cases to promote the deterrent policies of the antitrust laws and to ensure fairness in the apportionment of damages among antitrust defendants.

Contribution has been recognized in various areas of federal law. In *Cooper Stevedoring Co.* v. *Fritz Kopke, Inc.*, 417 U.S. 106, 111 (1974), this Court established the right to contribution in maritime noncollision cases. Federal courts have also recognized contribution rights in employment discrimination cases,[2] securities cases[3] and airline disaster cases.[4]

In *Cooper Stevedoring Co.* v. *Fritz Kopke, Inc.*, 417 U.S. 106, 111 (1974), this Court held that contribution was necessary to ensure fairness:

> [A] "more equal distribution of justice" can best be achieved by ameliorating the common-law rule against contribution which permits a plaintiff to force one of two wrongdoers to bear the entire loss, though the other may have been equally or more to blame.

This Court in *United States* v. *Reliable Transfer Co.*, 421 U.S. 397, 405 (1975), ruled that fairness compelled an equitable system of damage allocation based upon comparative fault. In *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U.S. 256, 271-72 n.30 (1979), this

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[2] *Glus* v. *G.C. Murphy Co.*, 629 F.2d 248 (3d Cir. 1980).

[3] *Heizer Corp.* v. *Ross*, 601 F.2d 330, 332-33 (7th Cir. 1979); *Wassel* v. *Eglowsky*, 399 F. Supp. 1330, 1367 (D. Md. 1975), *aff'd*, 542 F.2d 1235 (4th Cir. 1976).

[4] *Kohr* v. *Allegheny Airlines, Inc.*, 504 F.2d 400 (7th Cir. 1974), *cert. denied*, 421 U.S. 978 (1975).

Court declared that a tortfeasor "[n]ormally . . . may seek contribution from another concurrent tortfeasor.... Contribution remedies the unjust enrichment of the concurrent tortfeasor...."

In *Professional Beauty Supply, Inc.* v. *National Beauty Supply, Inc.*, 594 F.2d 1179, 1185-86 (8th Cir. 1979), the Eighth Circuit held that fundamental fairness requires recognition of contribution in antitrust actions:

> There is an obvious lack of sense and justice in a rule which permits the entire burden of restitution of a loss for which two parties are responsible to be placed upon one alone because of the plaintiff's whim or spite, or his collusion with the other wrongdoer.

See also Glus v. *G.C. Murphy Co.*, 629 F.2d 248, 252 (3d Cir. 1980); *Kohr* v. *Allegheny Airlines, Inc.*, 504 F.2d 400, 405 (7th Cir. 1974), *cert. denied*, 421 U.S. 978 (1975).

Contribution would promote the underlying policies of the antitrust laws. It would advance the disgorgement and deterrence objectives of the antitrust laws by ensuring that antitrust violators will be held accountable for their conduct. Without contribution, antitrust violators may obtain preferential "sweetheart settlements" irrespective of their relative market share or the merits of plaintiff's claims, or may completely escape liability. *See Cackling Acres, Inc.* v. *Olson Farms, Inc.*, 541 F.2d 242 (10th Cir. 1976), *cert. denied*, 429 U.S. 1122 (1977); *Olson Farms, Inc.* v. *Safeway Stores, Inc.*, 1977-2 Trade Cas. ¶ 61,698 (D. Utah 1977), *aff'd*, 1979-2 Trade Cas. ¶ 62,995 (10th Cir. 1979). The denial of contribution would undermine and "dilute the deterrent effect of the antitrust laws." *Professional Beauty Supply, Inc.* v. *National Beauty Supply, Inc.*, 594 F.2d 1179, 1185 (8th Cir. 1979).

The lack of contribution unfairly forces an antitrust defendant to absorb the consequences not only of his own

acts but also those of other defendants. A right to contribution is especially necessary in antitrust cases where joint and several liability and mandatory treble damages are coupled with massive class action damage exposure, such as in M.D.L. 310.

Recognition of contribution would promote fair settlements based upon the merits of the case. Final settlements can be achieved when contribution is coupled with claim reduction, which reduces claims against nonsettling defendants by an amount fairly allocable to the acts of settling defendants where there have been settlements by some, but not all, defendants. Claim reduction would protect nonsettling defendants' rights to contribution and settling defendants' interests in finality by treating settlements as providing plaintiffs with full satisfaction for any damages attributable to settling defendants' acts. *See Gomes* v. *Brodhurst*, 394 F.2d 465, 467 (3d Cir. 1967); *Little Rock School District* v. *Borden, Inc.*, 1980-1 Trade Cas. ¶ 63,059 (E.D. Ark. 1979); *Judson* v. *Peoples Bank & Trust Co.*, 17 N.J. 67, 93, 110 A.2d 24, 36-37 (1954). Recognition of contribution and claim reduction in antitrust cases would encourage voluntary settlements, foster the equitable distribution of liability among antitrust defendants, eliminate collusion, and bring "peace" to settling defendants.

Contribution would not complicate antitrust cases. It would not add new substantive issues or present procedural manageability problems. A defendant's liability for contribution would be established according to the same substantive standard used by plaintiff to prove antitrust liability. The argument that contribution would complicate antitrust actions has been rejected. *Professional Beauty Supply, Inc.* v. *National Beauty Supply, Inc.*, 594 F.2d 1179, 1185 (8th Cir. 1979).

II. CONTRIBUTION IN ANTITRUST CASES WOULD ELIMINATE SETTLEMENT COERCION SUCH AS THAT WHICH OCCURRED IN THE CORRUGATED CONTAINER ANTITRUST LITIGATION.

Although settlements in antitrust cases have been historically favored, plaintiffs' settlement tactics in M.D.L. 310 have completely perverted the settlement process and have "upset the delicate settlement balance by giving too great an advantage to the claimants—an advantage that is not required by the antitrust laws and one which might well hinder the highly favored practice of settlement." *City of Detroit* v. *Grinnell Corp.*, 495 F.2d 448, 459 (2d Cir. 1974). Recognition of contribution and claim reduction among antitrust defendants would not only eliminate settlement coercion, but would also restore the delicate settlement balance which was destroyed by plaintiffs in M.D.L. 310. Furthermore, the availability of contribution would prevent the negotiation of "sweetheart" settlements in which more culpable defendants settle early and cheaply to the detriment of the remaining firms.[5]

A. The Settlement History.

Plaintiffs negotiated the settlements in M.D.L. 310 based on market share or "points." Points equal an individual defendant's percentage of all defendants' sales of corrugated containers and sheets.[6] Plaintiffs classified defendant corporations into three groups—felony indictees, misdemeanor indictees, and unindicted corporations

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[5] *See* S. Rep. No. 428, 96th Cong., 1st Sess. 2 (1979); *The Antitrust Equal Enforcement Act of 1979: Hearings on S. 1468 Before the Subcomm. on Antitrust, Monopoly and Business Rights of the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. 72 (1979) (statement of Robert P. Taylor, Director, ABA Task Force on Contribution).

[6] Defendants in M.D.L. 310 account for approximately 75% of the total industry sales. Thus, settlement market share points represent approximately 1.33 times each defendant's actual total market share.

—and negotiated successive settlements with each corporation in each group, as illustrated in the following table.[7]

Company	Amount Per Point ($ million)	Market Share	Settlement Date
FELONY INDICTEES			
International Paper	1.0	8.3	8-24-78
Champion	4.5	5.36	12-18-78
Weyerhaeuser	5.0	7.83	1- 6-79
Owens-Illinois	6.0	5.45	1-12-79
Olinkraft	6.0	1.22	1-12-79
Continental Group	6.5	4.22	1-16-79
MISDEMEANOR INDICTEES			
Boise Cascade	3.5	2.82	12-18-78
Container Corp.	4.0	8.56	1- 6-79
Inland Container	4.75	7.29	1-18-79
Stone Container	4.75	3.05	1-18-79
St. Joe Paper Co.	4.75	2.62	1-18-79
UNINDICTED COMPANIES			
St. Regis Paper Co.	.5	3.97	7-21-78
Union Camp	2.0	3.7	12-13-78
Diamond International	2.0	.5	12-14-78
Dura Container	2.0	.37	12-14-78
Chesapeake Corp.	2.4	1.26	12-18-78
Longview Fibre	2.5	2.58	12-18-78
Willamette Industries	2.7	4.18	12-18-78
Menasha Corp.	2.75	1.67	12-18-78
MacMillan-Bloedel	4.0	2.11	12-18-78
U.S. Corrugated	4.0	.76	1-25-79
Green Bay Packaging	3.25	1.71	1-25-79

This chronology demonstrates that plaintiffs in M.D.L. 310 required each successive settling defendant within each group to pay an ever greater amount in proportion

[7] The table reflects plaintiffs' grouping and the settlement of each corporation in each group in chronological order, expressed in terms of millions of dollars per point of market sales. Thus, as shown in the table, International Paper with 8.3% of the market settled for 1.0 per point, or $8.3 million.

to its sales of corrugated containers and sheets than the preceding defendant in its group. Plaintiffs' ability to coerce successive escalation settlements from individual defendants in each group rested on the simple but pernicious fact that as each successive settlement was reached, plaintiffs claimed that the potential damage exposure to each defendant which had not yet settled would increase by geometric proportions.[8] Plaintiffs obtained ever greater

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[8] The Senate Judiciary Committee described the exploding potential liability on nonsettling defendants:

> The *Corrugated Container* litigation provides an excellent example for illustrating how today's vast damage claims are used unfairly to "whipsaw" settlements. . . . Apparently because of the large number of defendants and the disparity in the size, market share, and involvement in the alleged conspiracy, no sharing agreement existed. This, combined with the unavailability of contribution, made possible a classic example of what one witness called the whipsaw "game theory" in application.
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> The strategy of the plaintiffs was to break the defendants' ranks by offering discounted settlements to a few initially in order to pressure subsequent settlements at a higher price. The plaintiffs were successful, settling with the first defendant at $500,000 per percentage point of market share, and the second at $1 million. The second settlement was the more significant, for it was with a defendant which had the second largest market share (8.3%) and which was to plead nolo contendere in the criminal case. The $8.3 million settlement was clearly beneficial to the defendant because its potential liability for its own sales alone ranged from $50 to $250 million, and its total potential liability for the industry's sales ranged from over $250 million to well over $3 billion—depending on the damage estimate used.
>
> The sum deducted from the potential liability facing the other 35 defendants was only $8.3 million, however, not the $50-250 million traceable to the settling defendant's own sales. Since this defendant was now protected from having to share in paying off that sum, the liability of the other defendants thus increased for all practical purposes by that amount over-

leverage in each succeeding settlement negotiation without regard to the probability of class recovery against that individual corporation.[9]

The Third Circuit in *Mid-West Paper Products Co.* v. *Continental Group, Inc.*, 596 F.2d 573, 587 (3d Cir. 1979), noted that "courts have been wary of permitting 'overkill' recoveries, whose punitive impact may unduly cripple a defendant and lead to an overall deleterious effect upon competition." In M.D.L. 310, as a result of plaintiffs' settlement tactics, plaintiffs claim that Mead is liable for 100 percent of any damages in M.D.L. 310 even though it accounts for only approximately 2½% of the corrugated container industry's sales because the market shares of the defendants who settled were not withdrawn from the case.[10] In fact, plaintiffs in M.D.L. 310 demanded during all settlement negotiations the non-negotiable term that settling defendants' market shares remain in the lawsuit. Of course, in the absence of contribution, the settling defendants also had no incentive to remove their market shares from the lawsuit.

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night. This dramatic escalation in liability increased the settlement pressure as other defendants—now paying at a rate of $2 million a point and rising—sought to protect themselves. Because the damages attributable to these settling defendants also remained in the case, the damage exposure and settlement price thus continued to increase greatly for nonsettling defendants every time another defendant settled.

S. Rep. No. 428, 96th Cong., 1st Sess. 14-15 (1979).

[9] If this scenario were carried to its logical conclusion, a nonsettling defendant with a 1% market share could, if all other defendants settled, be potentially liable for damages based upon 100% of an industry's sales.

[10] In M.D.L. 310, plaintiffs admitted that each settling defendant "agreed to leave its sales in the lawsuit, thus making nonsettling defendants potentially liable for the full damage of the conspiracy." Memorandum of Class Plaintiffs in Support of Their Motion for Preliminary Approval of All Settlements, at 34.

B. The Settlements Were Extortionate.

The extortionate nature of the successive escalation settlement agreements in M.D.L. 310 becomes readily apparent upon analysis, as demonstrated by the following examples:

1. International Paper, the first of the felony indictees to settle, bought its peace for $8.3 million, or approximately $1.0 million per "point." Continental Group, the last of the felony indictees to settle, paid $27,430,000, or $6.5 million per "point," the highest rate of any settling defendant and six and one-half times greater than International Paper. International Paper, a company with twice Continental's market share, was permitted to settle for less than one-third of Continental's settlement simply because of its early position in the escalation timetable. If Continental had settled at $1 million per point, as did International Paper, its settlement would have been $4,220,000, not $27,430,000. This $23 million difference bears no relationship to relative market share or to relative culpability—International Paper pleaded *nolo contendere* whereas Continental pleaded not guilty and *was acquitted at the criminal trial*—or to the merits of plaintiffs' claims—both settlements were concluded before any significant civil discovery commenced. The Continental settlement is plainly and simply attributable to the enormously increased liability that plaintiffs claimed faced Continental as a result of prior settlements. After the International Paper and St. Regis settlements, the remaining defendants who had not settled accounted for approximately 88 percent of defendants' sales. By the time Continental settled, however, the nonsettling defendants accounted for less than 40 percent of defendants' sales. Continental's increased damage exposure under plaintiffs' theory was created because no claim reduction was included in any of the preceding settlements and there was no right of contribution among defendants.

2. Container Corporation of America was charged with a misdemeanor. Despite a market share virtually identical to International Paper, it paid $34.2 million, or more than four times the amount paid by International Paper, a felony indictee.

3. Although U.S. Corrugated Fibre-Box was not indicted and had the smallest market share of all defendants, it settled at a rate eight times higher than St. Regis and four times higher than International Paper.

4. Even though petitioner Georgia-Pacific was identified in the criminal cases as a *victim* of the alleged conspiracy, it was forced to settle with plaintiffs for $3 million. Thus, the absence of contribution allowed *plaintiffs* to victimize Georgia-Pacific.

5. The final settlement negotiated before the criminal verdict conclusively demonstrates the extortionate nature of the M.D.L. 310 settlements. George Kress, founder and president of Green Bay Packaging Co., Inc. ("Green Bay"), testified before the Senate Judiciary Committee's Subcommittee on Antitrust, Monopoly, and Business Rights concerning the Green Bay settlement. Mr. Kress testified that Green Bay, which was neither indicted nor named as an alleged co-conspirator in the criminal case, had decided to prove its innocence at trial in M.D.L. 310. After defendants having over 80 percent of sales settled, Green Bay learned that it could settle the case for $3.7 million per point, or 7.5 times the St. Regis settlement, on a take it or leave it basis. At this point, Green Bay calculated its potential liability in M.D.L. 310 to be $5 billion under plaintiffs' theory, an amount which not only would bankrupt Green Bay but also would immediately destroy its ability to borrow capital in financial markets.[11] Green Bay reluctantly

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[11] *The Antitrust Equal Enforcement Act of 1979: Hearings on S. 1468 Before the Subcomm. on Antitrust, Monopoly and Business Rights of the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. 33-34 (1979).

settled at the amount demanded by plaintiffs only after the full impact of its potential liability became apparent. As Mr. Kress testified:

> The effect of this extortive settlement practice upon a small, family-owned and managed business is catastrophic. We were threatened with a loss of over fifty years of effort and coerced into paying an exorbitant settlement rather than being afforded the privilege of ultimately proving our corporate innocence.[12]

At the trial against Mead, the jury in response to a special verdict form made a finding that Green Bay was not a co-conspirator. Yet, because of plaintiffs' coercive settlement tactics, which utilized the Rule 23 class action device coupled with "no contribution" as a club, Green Bay had been forced to settle at an exorbitant price.

The district court in M.D.L. 310 recognized the inherent coerciveness of the M.D.L. 310 escalation settlements:

> It appears that Westvaco seeks contribution primarily to avoid the coercive impact to it, as a late-settling or non-settling defendant, of the possibility of enormous damages being assessed against it. *That this possibility is inherently coercive is undisputable. . . . Even a defendant relatively certain of a judgment in his favor must have serious doubts about risking such exposure by going to trial.* (Emphasis added.) [13]

What the district court in M.D.L. 310 acknowledged has become commonplace in antitrust class actions. *See, e.g., Kline* v. *Coldwell, Banker & Co.*, 508 F.2d 226, 234 (9th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975); *Shapiro*

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[12] *Id.* at 35.

[13] Memorandum Opinion, *In re Corrugated Container Antitrust Litigation*, M.D.L. 310 (May 30, 1979).

v. *General Motors Corp.*, 472 F. Supp. 636, 660 (D. Md. 1979); *Arth Main Street Drugs* v. *Beer Distributors, Inc.*, 26 F.R. Serv. 2d 87 (N.D. Ind. 1978); *Hooley* v. *Red Carpet Corp. of America*, 1975 Trade Cas. ¶ 60,285 (D. Ore. 1975), *appeal dismissed*, 549 F.2d 643 (9th Cir. 1977); *Alsup* v. *Montgomery Ward & Co.*, 57 F.R.D. 89, 93 (N.D. Cal. 1972).

Furthermore, plaintiffs' "whipsaw tactics" [14] in M.D.L. 310 are even more objectionable than the "most favored nations" clause, the use of which in class action settlements has been consistently condemned by federal courts and the *Manual For Complex Litigation.* In each instance, not only can it be anticipated that a defendant whose guilt is clearest or whose pocket is deepest will settle early, but also a floor (or a built-in escalation factor) can be created for subsequent negotiations which has no bearing on the probability of class recovery against that defendant.

> As a result, a trial may be forced which nobody wants under circumstances in which all concerned, including the court, agree that a smaller settlement with the late-settling defendants would be fair and reasonable.

Manual For Complex Litigation, § 1.46 at 63. This is precisely the situation in M.D.L. 310. Mead faced an unacceptable choice: either capitulate to escalation settlement tactics amounting to "legalized blackmail" or go to trial and risk exposure under plaintiffs' theory to an inordinate and exorbitant judgment for damages based upon not only its own market share but also the market shares of all other defendants who had previously settled.

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[14] *See* S. Rep. No. 428, 96th Cong., 1st Sess. 2 (1979).

III. CONTRIBUTION IN ANTITRUST CLASS ACTIONS WOULD PREVENT THE MISUSE OF RULE 23 OF THE FEDERAL RULES OF CIVIL PROCEDURE.

Without a right to contribution among antitrust defendants, the class action provisions of Rule 23 of the Federal Rules of Civil Procedure combined with the rule of joint and several liability in civil damage actions and the mandatory treble damage remedy of Section 4 of the Clayton Act, 15 U.S.C. § 15, permit class plaintiffs to coerce settlements in antitrust class actions without regard to the merits of their claims. As the Third Circuit cautioned in *Mid-West Paper Products Co.* v. *Continental Group, Inc.*, 596 F.2d 573, 586-87 (3d Cir. 1979): "Notwithstanding the seriousness of the *per se* violation present in this case, the judiciary should not be hasty to allow the treble damage action to become so destructive a force, when Congress intended only that it be used as a weapon to enforce the antitrust laws."

Federal courts have expressed increasing concern that the aggregation of damage claims in class actions may coerce settlements from defendants and force them to abandon meritorious defenses. Thus, this Court in *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 476 (1978), observed:

> Certification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense.

In *Hooley* v. *Red Carpet Corp. of America*, 1975 Trade Cas. ¶ 60,285 at 66,112 (D. Ore. 1975), *appeal dismissed*, 549 F.2d 643 (9th Cir. 1977), the court acknowledged that the enormous risk of classwide treble damage liability "may well result in some or all of the defendants opting for a settlement . . . whether they were guilty of the plaintiffs' allegations or not." *See also Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 345-46 (1979) (Rehnquist, J., concurring); *Kline* v. *Coldwell, Banker & Co.*, 508

F.2d 226, 234 (9th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975). The need for contribution among antitrust defendants to strike an appropriate balance in the settlement process and to protect nonsettling defendants from disproportionate liability has become even more acute with the proliferation of class actions.[15]

M.D.L. 310 vividly demonstrates that "unless prudence and caution are exercised by the Bench and Bar, the Class Action device can be transformed from a useful tool to an *engine of destruction.*" (Emphasis added.)[16] The absence of contribution among antitrust defendants will continue to permit plaintiffs to use class certification to coerce unjust settlements and to transform Rule 23 into a "Frankenstein monster."[17] This harsh epithet is frightfully apropos to that which occurred in M.D.L. 310. It is precisely the abuse of Rule 23 engineered by plaintiffs in M.D.L. 310 that recognition of contribution among antitrust defendants would guard against. The right of contribution would deter only "unfair settle-

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[15] *See The Antitrust Equal Enforcement Act of 1979: Hearings on S. 1468 Before the Subcomm. on Antitrust, Monopoly and Business Rights of the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. 19 (1979) (testimony of John Shenefield, Assistant Attorney Gen., Antitrust Div., Dept. of Justice); *id.* at 76 (testimony of Robert P. Taylor, Director, ABA Task Force on Contribution); *see also* S. Rep. No. 428, 96th Cong., 1st Sess. 11 (1979) ("[T]he problem of contribution in price-fixing cases is one of relatively recent origin. As the hearing record indicates, the vast class action damage exposure from which the problem results did not surface until the 1970's, after the revision of Rule 23 to permit the modern class action in 1966 . . .").

[16] Oral Opinion in *Smith* v. *Beneficial Finance Co.*, Civ. Nos. 860-71, 861-71, 862-71 (D.N.J.), *quoted in* American College of Trial Lawyers, *Report and Recommendations of the Special Committee on Rule 23 of the Federal Rules of Civil Procedure*, III (1972).

[17] *Eisen* v. *Carlisle & Jacquelin*, 391 F.2d 555, 572 (2d Cir. 1968) (Lumbard, C. J., dissenting).

ments based on the risk of massive liability, without regard to culpability or damage caused." [18]

The rule against contribution has long been criticized by commentators precisely for its coercive effects on settlements in antitrust class actions.[19] The class action device, unfettered by contribution among antitrust defendants, permits plaintiffs to aggregate trivial claims "into enormous sums so crushing on the defendants as to induce huge settlements to avoid destruction." [20] Recently, the absence of contribution in antitrust class actions was criticized "because of the possible overwhelming liability of one company for the damages of an entire conspiracy and of the ability of plaintiffs to coerce settlements from defendants who fear that liability." [21]

The certification of a large antitrust class action without rights of contribution among defendants gives rise

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[18] ABA, Antitrust Section, *Resolutions and Report of the Section of Antitrust Law of the American Bar Association on Proposed Amendment of the Clayton Act to Permit Contribution in Damage Actions Brought Thereunder*, 8 (September 6, 1979), *reprinted in*, 936 Antitrust & Trade Reg. Rep. (BNA) E-2 (October 25, 1979); *see also* S. Rep. No. 428, 96th Cong., 1st Sess. 19 (1979) ("Plaintiffs' lawyers have testified that [contribution] will undermine the settlement process and lead to protracted antitrust suits, bottling up the courts for years. The committee rejects this scenario, finding that the effect of [contribution] would simply be to lessen the coercive nature of some of the plaintiffs' lawyers negotiations, and that the only settlements [contribution] will discourage in the long run are those it is intended to discourage—namely coerced settlements").

[19] Corbett, *Apportionment of Damages and Contribution Among Coconspirators in Antitrust Treble Damage Actions*, 31 Fordham L. Rev. 111 (1962); Paul, *Contribution and Indemnification Among Antitrust Coconspirators Revisited*, 41 Fordham L. Rev. 67 (1972); *see also Contribution Among Antitrust Defendants*, 33 Vanderbilt L. Rev. 979 (1980).

[20] Kirkham, *Complex Civil Litigation—Have Good Intentions Gone Awry?*, 70 F.R.D. 199, 206 (1976).

[21] *Contribution In Private Antitrust Actions*, 93 Harv. L. Rev. 1540 (1980).

to such tremendous pressures to settle before trial that the class action device has been aptly characterized by Professor Handler as a form of "legalized blackmail":

> Any device which is workable only because it utilizes the threat of unmanageable and expensive litigation to compel settlement is not a rule of procedure—it is a form of legalized blackmail. If defendants who maintain their innocence have no practical alternative but to settle, they have been *de facto* deprived of their constitutional right to a trial on the merits. The distinctions between innocent and guilty defendants and between those whose violations have worked great injury and those who have done little if any harm become blurred, if not invisible. The only significant issue becomes the size of the ransom to be paid for total peace.[22]

Thus, there is enormous settlement pressure even on innocent defendants.[23] Defendants are compelled to settle from fear of liability for the damages of an entire alleged conspiracy.[24]

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[22] Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits—The Twenty-third Annual Antitrust Review*, 71 Columbia L. Rev. 1, 9 (1971).

[23] Kirkham, *Complex Civil Litigation—Have Good Intentions Gone Awry?*, 70 F.R.D. 199, 207 (1976) ("No matter how sincere is [defendants'] belief in the innocence of their acts, they have little practical alternative but to settle, and certainly no alternative but to join in any settlement by [other defendants] or be left with a potential liability measured by the total damages a jury might find, trebled, less only the settlement amounts"); *The Antitrust Equal Enforcement Act of 1979: Hearings on S. 1468 Before the Subcomm. on Antitrust, Monopoly and Business Rights of the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. 75 (1979) (testimony of Robert P. Taylor, Director, ABA Task Force on Contribution) (estimates of potential liability for a "completely foundationless suit" range from 5% to 25%).

[24] *Contribution Among Antitrust Defendants*, 33 Vanderbilt L. Rev. 979, 995 (1980) ("[C]ontribution eliminates coercive or 'whip-saw' settlements in large cases. For example, in *In re Cor-*

Furthermore, when the potential damage exposure of a class action exceeds the net worth of a corporate defendant, the possibility of corporate destruction becomes real. Corporate management naturally tends to seek insurance against whatever remote chance of success plaintiffs may have. The settlement agreement becomes the corporation's life insurance policy, and the amount of settlement, its premium. Thus, "any settlement within [defendants'] purse, as a practical matter, may be their only chance for survival." [25]

Over the years, eminent plaintiffs' counsel have acknowledged the coercive effects of class certification by underscoring that such actions are invariably settled:

> *I have seen nothing so conducive to settlement of complex litigation as the establishment by the court of a class. . . .* When two very competently represented and major litigants have settled, I think it shows this. It shows that the problem is manageable. It shows that they feel that *this is the way that the litigation can be disposed of by settlement, namely, by having a class;* whereas, if there were no class, it would not be disposed of by settlement. *So I think that you sow the seed for the possibility of a settlement.* (Emphasis added.) [26]

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rugated Container Antitrust Litigation defendants had little or no choice but to settle, even if they were innocent of wrongdoing, because of the potentially staggering liability" claimed by plaintiffs) (footnote omitted); *The Antitrust Equal Enforcement Act of 1979: Hearing on S. 1468 Before the Subcomm. on Antitrust, Monopoly and Business Rights of the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. 68 (1979) (statement of Donald Kempf) ("[T]he practicalities of the situation are such that, increasingly, businessmen are concluding that they have no real option but to settle such antitrust claims, even when they are confident that they did nothing wrong and have a solid defense").

[25] Kirkham, *Complex Civil Litigation—Have Good Intentions Gone Awry?*, 70 F.R.D. 199, 207 (1976).

[26] *City of Philadelphia* v. *American Oil Co.*, Civ. No. 647-68 (D.N.J.), Transcript of Proceedings, 11 (March 1, 1971).

Furthermore, the Second Circuit in *Eisen* v. *Carlisle & Jacquelin*, 479 F.2d 1005 (2d Cir. 1973), *vacated and class action dismissed on other grounds*, 417 U.S. 156 (1974), astutely predicted that injustices would occur when the class action device is misused to extract settlements from antitrust defendants who are not entitled to contribution:

> There is reason to believe that the practical effect of these procedures, and the fact that possible recoveries run into astronomical amounts, generate more leverage and pressure on defendants to settle, even for millions of dollars, and in cases where the merits of the class representatives claim is to say the least doubtful, than did the old-fashioned strike suits made famous a generation or two ago by Clarence H. Venner.

Id. at 1019. As demonstrated above, this is precisely what happened in M.D.L. 310 without the right of contribution among defendants. The abuses to which Rule 23 is susceptible can be effectively eradicated by this Court's recognition of rights of contribution and claim reduction among antitrust defendants.

Not only has the lack of contribution rights allowed class plaintiffs in M.D.L. 310 to subvert the settlement process, but the extortionate settlements obtained through the mechanism of class certification have, in effect, rewritten substantive provisions of the antitrust laws.[27] Section 4 of the Clayton Act, 15 U.S.C. § 15, limits the recovery of treble damages to those who can prove an injury to their business or property by reason of a viola-

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[27] Rule 23 is a rule of procedure which does not alter substantive statutory provisions. *Snyder* v. *Harris*, 394 U.S. 332 (1969).

tion of the antitrust laws.[28] With contribution unavailable among antitrust defendants, plaintiffs in M.D.L. 310 grossly distorted these substantive provisions by using the class action device to coerce settlements which have no bearing whatever either to the actual damages which may have been suffered by class plaintiffs or to the relative culpability of each settling defendant. Thus, without contribution, antitrust class actions permit plaintiffs to shift private antitrust policy from compensation to confiscation. And the larger the stakes, the greater the incentive for plaintiffs to attempt to do just that, as has been accomplished by plaintiffs in M.D.L. 310.

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[28] This principle was affirmed by this Court in *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251 (1972), which held that recovery in a private antitrust action is limited to *actual* damages trebled: "In enacting [the antitrust] laws, Congress had many means at its disposal to penalize violators. It could have, for example, required violators to compensate federal, state, and local governments for the estimated damage to their respective economies caused by the violations. But, this remedy was not selected. Instead, Congress chose to permit all persons to sue to recover three times their actual damages every time they were injured in their business or property by an antitrust violation." *Id.* at 262.

CONCLUSION

For the foregoing reasons, The Mead Corporation respectfully submits that this Court should reverse the decision of the Court of Appeals for the Fifth Circuit in *Wilson P. Abraham Construction Corp.* v. *Texas Industries, Inc.*, and remand to the district court with instructions to permit rights of contribution and claim reduction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of December, 1980, three copies of the Brief of Amicus Curiae The Mead Corporation In Support of Petitioner Texas Industries, Inc. were mailed, postage prepaid, to the following:

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ALAN M. WISEMAN

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 79-1144

Texas Industries, Inc.,

Petitioner

v.

Radcliff Materials, Inc., Jimco, Inc., and OKC Dredging, Inc.,

Respondents

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

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INDEX

	Page
Brief for Olson Farms, Inc. as *Amicus Curiae*	1
Interest of *Amicus Curiae*	1
Argument	6
Point I — Contribution is Important to the Fair and Equitable Enforcement of the Antitrust Laws and the Promotion of Competition	7
Point II — Allowing Contribution Would Increase Rather than Decrease the Deterrent Effect of the Antitrust Laws	11
Point III — Allowing Contribution Would Not Significantly Increase the Complexity of Antitrust Lawsuits	15
Point IV — Allowing Contribution in Antitrust Cases Would Not Seriously Affect the Settlement of Such Cases	17
Conclusion	19

CITATIONS

	Page
CASES:	
Cackling Acres vs. Olson Farms, Inc., 541 F.2d 242 (10th Cir. 1976), *cert. denied*, 429 U.S. 1122 (1977)	2
Ford Motor Company vs. Mulby, 210 F.2d 137, 139 (4th Cir. 1954)	15
Glus vs. G.C. Murphy Company, et al., 23 FEP Cases 86 (3rd Cir., filed June 27, 1980)	6,10
National Society of Professional Engineers vs. United States, 435 U.S. 679, 699 (1978)	6
Olson Farms, Inc., vs. Safeway Stores, Inc., et al., No. 77-2068, 1979-2 Trade Cas. Para. 62, 995 (10th Cir. 1979)	8,9
Professional Beauty Supply vs. National Beauty Supply, 594 F.2d 1179 (8th Cir. 1979)	6,8,9
Sabre Shipping Corporation vs. American President Lines, Ltd., 298 F. Suppl. 1339 (S.D.N.Y. 1969)	11
Wilson P. Abraham Construction Corporation vs. Texas Industries, Inc., 604 F.2d 902 (5th Cir. 1979)	10,11,15
STATUTES AND RULES:	
Rule 42(b) F.R.C.P.	15
Rule 54(b) F.R.C.P.	15
OTHER AUTHORITIES:	
Antitrust Equal Enforcement Act of 1979: "Committee Report on Contribution in Antitrust Cases," p. 18, 96 Cong. 1st Sess. (1979)	14,17

Baker and Reeves, "The Paper Label Sentences: A Critique," 76 *Yale Law Journal* 621 (1977) 13

Corbett, "Apportionment of Damages and Contribution Among Co-Conspirators in Antitrust Treble Damage Actions," 21 *Fordham Law Rev.* 111, 137 (1962) 13,16

Dobbs, *Remedies,* Section 10.7 at 704 (1973) 13

Note, "Contribution in Private Antitrust Actions," 93 *Harvard Law Review* 1540, 1545-46 (1980) 7,12,15,18

Note, "Settlement in Joint Tort Cases," 18 *Stan. Law Review* 486, 490 (1966)..... 10

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Brief for Olson Farms, Inc. as *Amicus Curiae*.

Olson Farms has obtained consent from all parties to this litigation to file its *Amicus Curiae* brief.

INTEREST OF *AMICUS CURIAE*

Olson Farms has a substantial interest in the outcome of the controversy now before this Court. At the present time Olson Farms is the appellant in two separate suits which were heard *en banc* by the Tenth Circuit Court of Appeals on September 15, 1980, and which involve the question of contribution under the antitrust laws.

The manner in which the question concerning contribution arose is markedly different in the Tenth Circuit cases than in the case before this Court. It is important that this Court be informed of the procedural difference in the Tenth Circuit cases before this Court considers the possible formulation of an antitrust contribution rule of law which may be applicable to all controversies.

The first case, *Olson Farms, Inc., vs. Safeway Stores, Inc., et al.,* No. 77-2068, arose from a 1971 action (Cackling Acres case) in which certain Utah egg producers filed a suit against Olson Farms under the antitrust laws alleging that Olson Farms conspired with other companies to pay producers less for their eggs than they otherwise would have received. Even though most of the plaintiff-producers did not sell to Olson Farms, they nevertheless sought recovery solely against Olson Farms and declined to name the other co-conspirators as defendants.

At trial, the undisputed evidence was that Olson Farms purchased only approximately 11 percent of the eggs for which damages were claimed. The other identified conspirators purchased nearly all of the remaining 89 percent of the eggs. A jury verdict was returned against Olson Farms and it ultimately satisfied a judgment of nearly $2,500,000 — an amount approximately 10 times its market share.

No settlement was made between plaintiff and any of the other co-conspirators in that action. The matter was appealed to the Tenth Circuit Court of Appeals which affirmed the lower court judgment. *Cackling Acres vs. Olson Farms, Inc.,* 541 F.2d 242 (10th Cir. 1976), *cert. denied,* 429 U.S. 1122 (1977).

Olson Farms initiated Civil No. 77-2068 in 1975 by filing a Complaint against all of the companies identified by the plaintiff-producers in their successful action as co-conspirators. Thus, No. 77-2068 was an independent lawsuit commenced after termination of the plaintiffs'

case. The defendants were successful in persuading the district court to dismiss the case on the ground that antitrust laws did not permit contribution.

On appeal, a divided 2-1 panel of the Tenth Circuit Court of Appeals affirmed the lower court's dismissal. The majority opinion, written by a judge of the United States Court of Customs and Patent Appeals, held that a defendant in an antitrust action may not obtain contribution from others, in most circumstances, but suggested that contribution may be permitted in very limited circumstances. The Honorable William J. Holloway, Jr., dissented from the portion of the majority opinion denying a right to seek contribution, saying that the sounder result, consistent with equitable principles, would be to permit contribution among joint tort-feasors in antitrust actions.

Olson Farms petitioned for a rehearing and suggested a rehearing *en banc*. Its petition was granted on December 27, 1979, and the case was heard *en banc* on September 15, 1980.

The second suit now before the Tenth Circuit Court of Appeals is No. 78-1773. This case originated in 1975 when the successful plaintiffs-producers in the 1971 action filed a second lawsuit against Olson Farms and all the other principal co-conspirators except for Safeway Stores, Inc. This time plaintiffs sought damages from the date of the first complaint until the jury verdict was returned in March of 1974. Olson Farms counterclaimed against the plaintiffs in the second case, crossclaimed against each of the co-defendants, and filed a third-party complaint against Safeway Stores, Inc.

On December 19, 1977, the district court, relying upon its decision in No. 77-2068, dismissed the crossclaims and third-party complaint. In its opinion, the district court stated: "There is no readily discernable distinction between the earlier claims for contribution and indemnity and the present one."

Although not contained in the court record, at oral

argument Olson Farms stated that it and all other defendants had settled with the plaintiffs. The crossclaims and third-party claims, however, were not settled. The Tenth Circuit Court of Appeals panel in a 2 to 1 decision found no distinction between this case and No. 77-2068 and further found that since a settlement had occurred the determination of liability among the various co-conspirators would require further proceedings and involve obvious complexities which would require Congressional guidelines as to how such matters should be resolved.

The dissenting opinion filed by Judge Holloway stated that since the settlements were not in the record it was improper for the court to judge the possible merits of claims without any determination as to the liability of the parties. Judge Holloway incorporated his previous dissent in No. 77-2068 that contribution should be allowed in antitrust cases.

Olson Farms petitioned for rehearing and suggested rehearing *en banc,* which was also granted on December 27, 1979. This case was also heard *en banc* on September 15, 1980.

The present controversy now before this Court concerns the dismissal of petitioner's third-party complaint against unnamed alleged co-conspirators. The two Olson Farms cases, however, illustrate completely separate procedural distinctions. In the first case, Olson Farms sued its co-conspirators after the termination of plaintiffs' original suit by the means of an independent action. In the second case, Olson not only filed a third-party complaint against an unnamed co-conspirator, as in the present case, but also filed cross claims. In addition, the plaintiffs settled their dispute with all named defendants.

Olson Farms believes that the above procedural distinctions are important since they illustrate concrete fac-

tual circumstances in which contribution claims can arise. Since the facts in the present case do not encompass the above areas, it is unlikely that such factual circumstances will be considered by the parties before this Court. This Court should be informed of these distinctions, however, in order to make a comprehensive study of the ramifications adoption of a rule permitting or prohibiting contribution would have.

In the alternative, Olson Farms wishes to argue its *amicus* position that, should this Court resolve the contribution issue based solely upon the facts in the instant case, this Court should not preclude the question of contribution in the procedural context now pending before the Tenth Circuit Court of Appeals. In such a case, this Court should await petition by the parties to the Olson Farms litigation to determine the contribution question in a context markedly different from that now before the Court.

Finally, Olson Farms believes that its experience during the last nine years of antitrust litigation may prove informative to this Court in formulating its decision as to the merits of antitrust contribution.

ARGUMENT

There is little dispute among the authorities or the parties to this lawsuit that federal common law controls the question of whether contribution is allowable in antitrust cases. As stated by this Court in *National Society of Professional Engineers v. United States,* 435 U.S. 679, 699 (1978):

> Congress,. . . did not intend the text of the Sherman Act to delineate the full meaning of the statute or its application in concrete situations. Legislative history makes it perfectly clear that it expected the courts to give shape to the statute's broad mandate by drawing on common law tradition.

While arguments have been raised that the contribution question is a legislative matter, the 8th Circuit Court of Appeals in *Professional Beauty Supply v. National Beauty Supply,* 594 F.2d 1179 (8th Cir. 1979), countered this argument by stating:

> We initially note that antitrust statutes are not purported to be comprehensive and, possibly as a result, courts have not been prone to await Congressional action to resolve many of the questions left unanswered by the statute, such as the nature of the cause of action, apportionment of judgments, assignments, survival and limitations. We further observe that there is a dirth of case law on this issue and comment that a complicated legal issue which is raised so infrequently is unlikely to spur immediate Congressional action. Finally, we find further support for our position from the fact that federal courts have been willing to formulate rules for contribution in other areas of the law without express Congressional direction. (See cases cited therein.) *Id.* at 1184-1185.

In addition to those cases cited in *Professional Beauty Supply, supra,* the Third Circuit Court of Appeals in *Glus et al vs. the G. C. Murphy Company, et al.,* 23 FEP Cases 86

(3rd Cir. filed June 27, 1980) held that contribution was permissible under Title VII of the Civil Rights Act of 1964, even though the statute itself did not give such a right.

Assuming, therefore, that this Court should determine the question of contribution in antitrust cases as a matter of federal common law, there are four principal reasons that justify contribution in antitrust cases: (1) fairness, equity and fundamental antitrust policy dictate that contribution be allowed; (2) the deterrent effect of the antitrust laws would be enhanced by contribution; (3) the complexity of antitrust litigation will not be significantly increased by contribution; and (4) contribution will not interfere with orderly settlement of antitrust litigation. *See e.g.*, Note, 93 *Harvard Law Review* 1540 (1980).

Olson Farms will address each of these factors in light of general statutory and judicial law and relate each fact to the specific problem Olson Farms has encountered in its litigation.

POINT I

CONTRIBUTION IS IMPORTANT TO THE FAIR AND EQUITABLE ENFORCEMENT OF THE ANTITRUST LAWS AND THE PROMOTION OF COMPETITION.

The unfairness of a rule against contribution is a primary reason for its alteration. "[T]here is an obvious lack of sense and justice in a rule which permits the entire burden of restitution of a loss for which two parties are

responsible to be placed upon one alone because of the plaintiff's whim or spite, or his collusion with the other wrong-doers." *Professional Beauty Supply, Inc., v. National Beauty Supply, Inc.*, 594 F.2d 1179, 1185-86 (8th Cir. 1979).

The first Olson Farms case dramatically illustrates this statement. Olson farms purchased eggs from only three of the 14 plaintiffs, and only purchased 11 percent of the total eggs sold by the plaintiffs. Most of the remaining 89 percent of the eggs were purchased by the defendants named by Olson Farms in No. 77-2068, *Olson Farms, Inc., v. Safeway Stores, Inc.*, 1979-2 Trade Cas. Para. 62,995 (10th Cir. 1979).

Evidence at the *Cackling Acres* trial showed the number of eggs purchased and the damages claimed by the plaintiffs as to each egg buyer as follows:

Egg Buyer	Dozens Purchased	Damages Claimed
Safeway Stores	6,297,888	$271,129
Egg Products Co.	4,497,222	197,618
Countryside Eggs & Gusto Marketing	2,724,824	119,961
Snow White Egg Co.	3,574,070	157,052
Olson Farms	2,288,650	99,656

Thus, although the damages claimed as to Olson Farms was only approximately $100,000, and even trebled was only approximately $300,000, Olson Farms was forced to satisfy a judgment of nearly $2,500,000.

The plaintiff chose to sue Olson Farms alone because of its solvency and because the plaintiffs had ceased selling eggs to Olson Farms. It was explained by one of the plaintiffs at the *Cackling Acres* trial that Olson Farms was sued, and other purchasers of eggs were not, because suing the other distributors would have disrupted the ongoing business relationship between them. The following colloquy occurred between *amicus'* counsel and a plaintiff.

Q. You didn't sue Countryside in this case?
A. No, sir.
Q. Why not?
A. For the simple reason that we were doing business with them, and they was taking our eggs. And it's pretty hard when you have 1,200 cases on the market to be dropped.

(Cross-examination of Bud Jones Shepherd by H. Christensen, January 29, 1974, official transcript of *Cackling Acres,* pp. 4632, 4633.)

The present status of the law that a single defendant may be obligated to answer for the practice of an entire industry is not only inequitable, but is also economically unwise. Assuming that all defendants in an antitrust conspiracy are equally accountable, the law places an unequal burden upon the defendants and, in fact, many times allows a co-conspirator to escape all liability even when the co-conspirators were the moving force behind the conspiracy. The co-conspirator, therefore, is allowed to go "scot free" because of the "whim or spite" of the plaintiff. *Professional Beauty Supply, supra,* 594 F.2d at 1185.

Judge Holloway was concerned about the lack of fairness of a rule against contribution as applied to the facts in the Olson Farms case. In his dissenting opinion he stated:

> *It does not seem to me that an antitrust defendant found guilty of a violation should be rejected as a lost soul with no claim on the conscience of the court.* The result of imposing the entire treble damage liability on one defendant while denying him any right to seek contribution from others jointly involved with him in the wrong, is too extreme for me. In this instance the damages claimed against Olson Farms, as the majority opinion states, were $99,656 and, trebled, the alleged liability would have amounted to $298,968. Yet the averment is that Olson satisfied a judgment, plus costs, interest and attorneys' fees, by paying the

> plaintiffs in the 1971 suit the sum of $2,405,580. (slip opinion, page 5.) (Emphasis added.)

Even again assuming that a defendant in an antitrust action is guilty of prohibited conduct, this fact should not permit unjust enrichment by both the plaintiff and the other co-conspirators. As noted in *Glus v. G. C. Murphy Company, supra,* regarding contribution under the Civil Rights Act, the court stated:

> The contribution rule prevents a plaintiff from becoming unjustly enriched either by collusive activity with one of the defendants, or by threatening one defendant that the suit will be brought only against it, thereby forcing an unjustified settlement. See Note, "Settlement in Joint Tort Cases," 18 *Stan. L. Rev.* 486, 490 (1966).

Likewise, Judge Holloway in his dissent noted that the allegations of Olson Farms made a compelling claim for recovery to avoid unjust enrichment of the other defendants on the theory that the damages paid by Olson Farms for the other defendants were directly related to the benefit those defendants received by purchasing eggs at the unlawfully depressed prices. (Slip opinion, p. 5-6). The effect of which is, of course, to weaken rather than strengthen competition because all conspirators have not been required to restore their improper gains.

The overall effect of this type of unjust enrichment is extremely anti-competitive particularly in integrated industries like the egg industry where competitors of plaintiffs at one level may be driven out of business if they are selectively named sole defendants in a suit involving their activity at a completely separate level of industry.

The Fifth Circuit Court of Appeals in *Wilson P. Abraham Construction Corporation v. Texas Industries, Inc.,* 604 F.2d (5th Cir. 1979), recognized that an inequity may result when all antitrust violators were not treated equally. *Id.* at 905-906.

Furthermore, it should not matter when a claim for contribution arises, whether at the time litigation is commenced or after an unsuccessful attempt to defend an antitrust claim. The principles of fairness and equity require that all parties be treated the same. The objectives of the antitrust laws can be well served only when this occurs.

For these reasons, the equity and fairness of the judicial system and the fundamental policy of the antitrust laws in promoting competition require that contribution be allowed in antitrust litigation.

POINT II

ALLOWING CONTRIBUTION WOULD INCREASE RATHER THAN DECREASE THE DETERRENT EFFECT OF THE ANTITRUST LAWS.

Opponents of contribution argue that the possibility of imposition of sole liability for an industry-wide practice has an enhanced deterrent effect on any potential violator of antitrust laws. The chance that a participant may be faced with a full judgment is thought to be more likely to discourage anticompetitive conduct than would ensuring that each participant pays only a share. *Wilson P. Abraham Construction v. Texas Industries, Inc.*, 604 F.2d 897, 901 (5th Cir. 1979); *Sabre Shipping Corporation v. American President Lines, Ltd.*, 298 F. Supp. 1339 (S.D.N.Y. 1969). This argument, when considered against the backdrop of a concrete situation such as Olson Farms No. 77-2068, does not have merit. It makes little sense to say that punishing one competitor by making it pay 10 times more than its market share and then trebling it, while allowing a competing conspirator with a larger market share to retain the full benefit of its illegal conduct, results in a strong deterrence to members of an industry.

Furthermore, the validity of any argument regarding deterence must account for the motivating forces behind business decisions. Businessmen that are unaware they are potentially liable for their co-conspirator's damages cannot be deterred by a rule against contribution.

It is submitted by *amicus* Olson Farms that allowing contribution would not adversely impact the deterrent policy of the antitrust laws. First, it is as likely that informed businessmen are as willing to take a chance of going "scot free" and escape all liability as they are fearful of being liable for other co-conspirators' damages.

Second, as noted previously, many businessmen make their decisions completely unaware of the consequences of the co-conspirator laws. Usually it is not the top management of a company which violates the antitrust laws, but rather it is the middle level manager. As stated by one commentator:

> It is often the middle level managers, whose goals differ from those of top management, who make decisions that lead to antitrust violations. These managers seek their own advancement within the company and find an advancement tied to their ability to produce profits. They therefore may feel considerable pressure to undertake anti-competitive activity such as price fixing to maintain or increase profits. An increase in profits, albeit through an antitrust violation, would benefit the career advancement goal of middle level managers. The deterrent effect of a determination that those managers violated the antitrust laws would not be tied to the magnitude of liability because firm sanctions against such managers depend primarily upon the facts of violation. Under such circumstances allowing contribution would best deter antitrust violations, where it would increase the probability that the company will be held liable for those violations and hence increase the frequency of company sanctions against overzealous employees. Note, "Contribution in Private Antitrust Actions," 93 *Harvard Law Review* 1540, 1545-46 (1980) (footnotes omitted).

The correctness of the above statement was illustrated by *Cackling Acres,* in that the violations both proven and alleged occurred because of the actions of the Utah lower level managers and were not attributable to decisions from the corporate headquarters in California.

Third, treble damages themselves are a significant penalty even for a company's proportionate share attributable to participation in a price-fixing conspiracy. Plaintiffs tend to sue every defendent they can reach; and as one scholar noted, "Since damages are trebled, there is quite a sufficient quantum of liability to punish '[all wrongdoers] by forcing them to share the liability.' " Dobbs, *Remedies,* Section 10.7 at 704 (1973).

In addition to the trebling of damages as a deterrent, there are numerous state and federal criminal actions which may be brought against an antitrust violator and which are a part of the panoply of deterrent actions which can be used to deal with such violators. Two noted authors conclude that the most effective deterrent is prison sentences for corporate executives involved in antitrust violations. *See Baker and Reeves,* "The Paper Label Sentences: A Critique," 76 *Yale Law Journal* 621 (1977).

Fourth, the fact that contribution is allowable increases the probability that any co-conspirator will be discovered. Professor Corbett made this observation when he stated:

> [N]ot only would the existence of a right of contribution remove to a great extent the possibility of escaping liability entirely, making it less attractive for smaller companies particularly to join in any concerted violation, but it would in a sense add *vigor to the enforcement of the antitrust laws* by allowing the conspirators themselves to ensure that all those participating in the unlawful action are appropriately penalized. Corbett, "Apportionment of Damages and Contribution Among Co-Conspirators in Antitrust Treble Damage Actions," 31 *Fordham Law Rev.* 111, 137 (1962) (Emphasis added.)

Finally, there is a severe danger of overkill in the case of price fixing where "intent" is in fact not a prerequisite to civil awards and where a rational punishment may deter legitimate activity that is close to the line and threatens small companies at the expense of the large. Similarly, unjustified settlements force smaller companies to reduce the funds available for increased productivity in competing both nationally and internationally. Indeed, failure to remedy the current situation may contribute to the conglomerate merger movement. Antitrust Equal Enforcement Act of 1979: "Committee Report on Contribution in Antitrust Cases," p. 18, 96 Cong. 1st Sess. (1979).

The preceding arguments relate to intentional as well as unintentional violators of the antitrust laws. Given the fact that aggressive businessmen may intend to take actions lawful in themselves, but when combined with other intentional acts may also form the basis for an inference that the businessman intended a violation of the antitrust laws, it is not appropriate to consider a distinction on contribution based upon whether the conduct was intentional or unintentional.

The actions taken by Olson Farms found to be in violations of antitrust laws were performed by middle level managers, unaware of the law of conspiracy and the lack of contribution. The evidence clearly established that Olson Farms, in fact, entered a market in which a conspiracy had already been established. Just as in numerous cases, therefore, the legal effect of allowing or disallowing contribution would have had no consequences as to the actions taken by Olson Farms employees.

The lack of contribution, however, has now made these passive actions an extreme punishment even more than Congress intended through the treble damage provision of the antitrust laws. Olson Farms has been forced to pay nearly 10 times its share in the first case and, in the second case, to settle with the plaintiffs even though Olson Farms disclaimed liability and even though no

liability has been established. Certainly, under these conditions allowing contribution would increase, rather than decrease, the deterrent effect of the antitrust laws.

POINT III.

ALLOWING CONTRIBUTION WOULD NOT SIGNIFICANTLY INCREASE THE COMPLEXITY OF ANTITRUST LAWSUITS.

The Fifth Circuit Court of Appeals in rejecting contribution voiced the argument that allowance of third-party claims may open a Pandora's Box of procedural problems. *Wilson Abraham Const, supra.* 604 F.2d 906. These arguments claiming a resulting increased complexity of federal antitrust lawsuits and the inability of plaintiffs to control their lawsuits are without merit.

Under Rule 42(b) of the Federal Rules of Civil Procedure trial judges are empowered to organize a lawsuit to serve the purposes of efficiency as defined by the equities. Separated claims and parties need not confuse or complicate a trial. *See Ford Motor Company v. Mulby,* 210 F.2d 137, 139 (4th Cir. 1954). Moreover, under Rule 54(b) the original plaintiff can obtain a final judgment on his claims even if separate claims for contributions are still pending.

A claim for contribution is not against a plaintiff but is against the other defendants. As stated by one commentator:

> The plaintiff need face no more issues than it might have faced against the original defendant, since intervenors or interpleaded third-party defendants should only raise the same defenses as the original defendants. Note, "Contribution in Private Antitrust Actions," 91 *Harvard L. Rev.* 1540, 1549 (1980).

Since it is a frequently employed tactic for an antitrust plaintiff to join as many defendants as may reasonably be expected to be liable, with a view to insuring full recovery, it is difficult to see how the plaintiffs' burden would be increased by permitting contribution. Corbett, "Apportionment of Damages in Contribution Among Co-conspirators in Antitrust Treble Damage Actions," 31 *Fordham Law Review* 111 (1962). This principle can easily be seen in the first Olson Farms case in which the claim for contribution was made after the plaintiffs' case had been finally adjudicated. In such lawsuits it is unlikely that the plaintiff would have any role whatsoever in determining the apportionment of the damages previously obtained.

Even as to those cases in which some defendants have settled or in which unnamed co-conspirators have settled, the determination of apportionment of damage awards either pro tanto, pro rata or by excluding a settling defendant's conduct from further litigation generally would introduce no new factual dispute into a case. These methods would not require the plaintiff to contest the settler's liability in order to preserve its award.

In the second Olson Farms case, for example, had three to four of the defendants elected to settle with the plaintiff these companies would no longer be parties to the court action but their share of the market and their actions would still remain facts to be proven by the plaintiff. Any judgment awarded could easily be apportioned among the various remaining and settling defendants based solely upon the evidence adduced at trial, with no increase in the burden in which the plaintiff would have had to carry.

For these reasons, any additional complexity in federal antitrust litigation would be minuscule when weighed against the serious inequity which now exists without the right of contribution.

POINT IV.

ALLOWING CONTRIBUTION IN ANTITRUST CASES WOULD NOT SERIOUSLY AFFECT THE SETTLEMENT OF SUCH CASES.

Attorneys for plaintiffs are concerned that contribution would seriously affect their ability to settle antitrust litigation. There is no doubt that the desire of defendants to settle would be curtailed with the allowance of contribution. However, the reason for the slowdown in settlement is simply that defendants could no longer be coerced and intimidated into settling because of their fear that continued presence in the lawsuit would result in enormous liability based upon industry-wide practice.

As stated by the committee report in the hearings for Senate Bill 1468:

> Plaintiffs' lawyers have testified that S.1468 will undermine the settlement process and lead to protracted antitrust suits, bottling up the courts for years. The committee rejects this scenario, finding that the effect of S.1468 would simply be to lessen the coercive nature of some of plaintiff's lawyers's negotiations, and that the only settlement S.1468 will discourage in the long run are those it is intended to discourage — namely, coerced settlements.
>
> In the earlier discussion the committee noted that as a matter of policy, it is necessary to balance the desire to terminate antitrust cases in as rapid a manner as possible with the rights of the defendants to utilize the courts to assert their innocence. Since the courts were established to resolve disputes, the parties should not be denied the opportunity to present their substantive case because of fear of liability for damages caused by others who have settled. Committee Report, *supra,* page 14.

Moreover, settlement generally should occur regardless of a contribution rule if both sides have the same

estimates of the probability that the defendant will be held liable, since they could avoid litigation costs and uncertainty by settling.

The allowance of contribution would eliminate the inequities in which the amount each defendant must pay for settlement dramatically increases as each new settlement has been made. Contribution, as noted previously, also allows the innocent party to litigate to prove his innocence without the risk of assuming liability for all the damages caused by the actual wrongdoers.

Amicus Olson Farms believes that the right of contribution should be available to all defendants — both those who have unintentionally violated the law as well as those who intentionally acted. Moreover, defendants should be allowed to assert contribution during the plaintiffs' trial or in a subsequent action. Finally, *Amicus* believes that a rule apportioning damages based upon the percentage of the items forming the basis for the claim is the most equitable method.

In a proper case a court should be able to fashion a rule of contribution which will protect the rights of settling defendants. *Professional Beauty Supply, supra,* 594 F.2d at 1184. There have been numerous proposals made as to the manner in which apportionment of damages should be made in a contribution case involving the various types of defendants. These proposals including that of the Eighth Circuit, Senate Bill 1468, the American Bar Association and others are well-stated in Note, "Contribution in Private Antitrust Actions," 93 *Harvard Law Review* 1540, 1555-1561 (1980).

If this Court allows contribution in antitrust cases this Court must also formulate a formula to be applied in the various types of cases. *Amicus* Olson Farms again respectfully requests that this rule be formulated to include the situations occurring in the two Olson Farms cases or that such a rule be reserved until the proper case is before

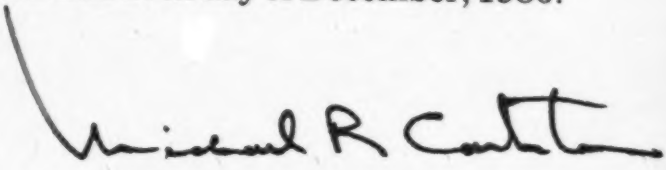
this Court.

Any rule formulated by this Court to allow contribution can only affirmatively support rational and equitable settlements which would no longer be subject to the abuses evidenced in the cases cited.

CONCLUSION.

Allowance of contribution in federal antitrust cases under federal common law is a significant step forward in the development of a fair and equitable procedure to enforce the antitrust laws while at the same time respecting the rights of the offending parties. Since the manner in which contribution may arise is varied, this Court should formulate a rule designed to cover all such situations or should specifically narrow its opinion to the facts of the case at bar.

Respectfully submited this 17th day of December, 1980.



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No. 79-1144

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

TEXAS INDUSTRIES, INC.,
Petitioner,

VS.

RADCLIFF MATERIALS, INC., et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF AMICI CURIAE OWENS-ILLINOIS, INC. AND CERTAIN OTHER DEFENDANTS IN THE CORRUGATED CONTAINER LITIGATION

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TABLE OF CONTENTS

	PAGE
Table of Authorities	ii
Interest of Amici Curiae	2
Summary of Argument	4
Argument	5
I. A Contribution Cause of Action Against Settling Antitrust Defendants Would Deter Settlements	8
II. A Contribution Cause of Action Against Settling Antitrust Defendants Would Not Promote Fairness	17
III. A Contribution Cause of Action Against Settling Antitrust Defendants Would Complicate and Lengthen Already Burdensome Litigation	19
Conclusion	22

TABLE OF AUTHORITIES

Cases

	PAGE
Alabama v. Blue Bird Body Co., No. 75-23-N (M.D. Ala. June 22, 1979), *appeal docketed,* No. 79-2667 (5th Cir. July 26, 1979)	10, 11
Altman v. Liberty Equities Corp., 54 F.R.D. 620 (S.D. N.Y. 1972)	12
In re Ampicillin Antitrust Litigation, 82 F.R.D. 647 (D.D.C. 1979)	10, 17
In re Beef Industry Antitrust Litigation, 607 F.2d 167 (5th Cir. 1979), *petition for cert. pending sub nom.* Iowa Beef Processors, Inc. v. Meat Price Investigators Ass'n, No. 79-1214 (filed Feb. 6, 1980)	10
Beights v. W. R. Grace & Co., 67 F.R.D. 81 (W.D. Okla. 1975)	20
In re Corrugated Container Antitrust Litigation, 84 F.R.D. 40 (S.D. Tex.), *aff'd per curiam,* 606 F.2d 319 (5th Cir. 1979), *cert. dismissed,* No. 79-972 (Oct. 20, 1980)	9, 10
Cotton v. Hinton, 559 F.2d 1326 (5th Cir. 1977)	8
D. H. Overmyer Co. v. Loflin, 440 F.2d 1213 (5th Cir.), *cert. denied,* 404 U.S. 851 (1971)	8
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El Camino Glass v. Sunglo Glass Co., 1977-1 Trade Cases ¶ 61,533 (N.D. Cal. 1976)	10
In re Fine Paper Antitrust Litigation, M.D.L. No. 323 (E.D. Pa. Aug. 3, 1979)	10, 11

PAGE

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Glus v. G. C. Murphy Co., 23 Empl. Prac. Dec. ¶ 31,062 (3d Cir. 1980) 13

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Hedges Enterprises v. Continental Group, Inc., 1979-1 Trade Cases ¶ 62,717 (E.D. Pa.) 10

Heizer Corp. v. Ross, 601 F.2d 330 (7th Cir. 1979) ... 11

Herzfeld v. Laventhol, Krekstein, Horwath & Horwath, 540 F.2d 27 (2d Cir. 1976) 12

Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977) 20

Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 110 A.2d 24 (1954) 13, 14

Kohr v. Allegheny Airlines, Inc., 504 F.2d 400 (7th Cir. 1974), *cert. denied*, 421 U.S. 978 (1975) 13

Leger v. Drilling Well Control, Inc., 592 F.2d 1246 (5th Cir. 1979) 14

Martello v. Hawley, 300 F.2d 721 (D.C. Cir. 1962) ... 14

McLean v. Alexander, 449 F.Supp. 1251 (D. Del. 1978), *rev'd on other grounds*, 559 F.2d 1190 (3d Cir. 1979) 12

Muth v. Dechert, Price & Rhoads, 391 F.Supp. 935 (E.D. Pa. 1975) 12

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Olson Farms, Inc. v. Safeway Stores, Inc., 1979-2 Trade Cases ¶ 62,995 (10th Cir.), *en banc rehearing granted*, No. 77-2068 (Dec. 27, 1979) 10

PAGE

Palestine Contractors, Inc. v. Perkins, 386 S.W.2d 764 (Tex. 1964) 14

In re Paris Air Crash of March 3, 1974, 69 F.R.D. 310 (C.D. Cal. 1975) 20

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Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179 (8th Cir. 1979) 10, 11, 17, 21

Sabre Shipping Corp. v. American President Lines, Ltd., 298 F.Supp. 1339 (S.D.N.Y. 1969) 9, 10

St. Louis Mining & Milling Co. v. Montana Mining Co., 171 U.S. 650 (1898) 8

Schlegel Manufacturing Co. v. USM Corp., 525 F.2d 775 (6th Cir. 1975), *cert. denied*, 425 U.S. 912 (1976) 8

Shippers Pre-Cooling Service v. Macks, 181 F.2d 510 (5th Cir.), *cert. denied*, 340 U.S. 816 (1950) 20

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Williams v. First National Bank, 216 U.S. 582 (1910) 8

Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321 (1971) 8

Federal Statutes

Federal Rule of Civil Procedure 42(b) 20

Securities Act of 1933, § 11(f), 15 U.S.C. § 77k(f) 11

Securities and Exchange Act of 1934, §§ 9(e), 18(b), 15 U.S.C. §§ 78i(e), 78r(b) 11

State Statutes

Cal. Civ. Proc. Code § 877 14

Fla. Stat. Ann. § 768.31 14

PAGE

Ill. Rev. Stat. Ann. (Supp. 1980) ch. 70, § 302 14

Mass. Gen. Law Ann., Chap. 231B, § 4 14

Mich. Comp. Laws Ann. § 600.2925d 14

N.Y. Gen. Obligations Law § 15-108(b) 12, 14

Ohio Rev. Code Ann. § 2307.32 14

42 Pa. Cons. Stat. Ann. § 8327 14

Texas Rev. Civ. Stat. Ann. art. 2212a §§ 2(d), 2(e) ... 14

Other Authorities

Note, *Contribution in Private Antitrust Actions*, 93 Harv. L. Rev. 1540 (1980) 17

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Sellers, *Contribution in Antitrust Damage Actions*, 24 Vill. L. Rev. 829 (1979) 14

No. 79-1144

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VS.

RADCLIFF MATERIALS, INC., et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF AMICI CURIAE OWENS-ILLINOIS, INC. AND CERTAIN OTHER DEFENDANTS IN THE CORRUGATED CONTAINER LITIGATION

Owens-Illinois, Inc. and other *amici curiae* listed below submit that this Court should not recognize, either expressly or by implication, a contribution cause of action against settling antitrust defendants. Instead, it is submitted that the Court should specifically reject such a cause of action against settling antitrust defendants, irrespective of the Court's resolution of the contribution issues presented in this case.[1]

[1] Attorneys for petitioner and respondents have consented in writing to the filing of this brief. These written consents are being filed concurrently with the brief pursuant to Rule 36.2 of the Rules of this Court.

INTEREST OF AMICI CURIAE

The undersigned *amici curiae* are manufacturers of corrugated containers and sheets. They were among 37 co-defendants in numerous antitrust class actions that were consolidated in the *Corrugated Container* litigation (M.D.L. 310) in the District Court for the Southern District of Texas. The complaints in all of the actions charged the defendants with fixing prices of corrugated containers and sheets and thereby injuring the members of the alleged class of purchasers of such products. Before trial, the undersigned *amici* and other defendants settled the class claims for over $300 million and were dismissed from the actions.

As a result of those settlements, three of their co-defendants who had not settled with class plaintiffs, Westvaco Corporation ("Westvaco"), Packaging Corporation of America ("PCA"), and Georgia-Pacific Corporation ("Georgia-Pacific"), moved to amend their answers to assert (a) cross-claims for contribution against the settling defendants in the event that those non-settling defendants proceeded to trial and were found liable to plaintiffs, and (b) affirmative defenses alleging that, by virtue of the settlements, plaintiffs had waived that portion of their claims fairly allocable to the settling defendants ("claim reduction"). The District Court dismissed the proposed cross-claims; the Court of Appeals for the Fifth Circuit affirmed; and the three defendants (who had not yet settled) petitioned for a writ of certiorari, which this Court granted on June 16, 1980. *Westvaco Corp., et al.* v. *Adams Extract Co., et al.* (No. 79-972). However, between the filing of the petition for certiorari and the time for filing of respondents' briefs, all three petitioners settled the class claims. On October 20, 1980, this Court dismissed the writ

of certiorari, and on December 15, 1980, it denied the petition of Georgia-Pacific and PCA for rehearing.

A fourth non-settling defendant in the class actions, Mead Corporation ("Mead"), filed a separate complaint for contribution, which was dismissed in December 1979. Mead was not a party petitioner in the *Westvaco* appeal, *supra*. Since the dismissal order was entered in a separate proceeding filed by Mead, the dismissal order constituted a final appealable judgment. Mead elected, however, not to file a notice of appeal from the dismissal order and instead filed a motion for reconsideration by the District Court.

The trial of the class action cases in the District Court concluded on September 13, 1980 with a jury finding against Mead, ultimately the only non-settling defendant. The jury found that class members had been damaged in the amount of 5% of their purchases for the time period involved.

Although Mead was not a petitioner in the *Westvaco* case, on September 17, 1980 it petitioned this Court to intervene in that matter. In its papers in support of its petition to intervene, Mead argued that its claim for contribution remains pending in the District Court because its motion for reconsideration of the District Court's order dismissing that claim has not been resolved. Moreover, in an *amicus curiae* brief filed in this matter on December 18, 1980, Mead continues to assert its "rights to contribution." (Brief of Amicus Curiae The Mead Corporation in Support of Petitioner Texas Industries, Inc. at 3.)

Thus, while the undersigned *amici* deny that Mead or any other party has any right to contribution against them, they continue to face threatened claims of liability for contribution. Petitioner here, Texas Industries, Inc., although seek-

ing relief in the particular situation in which it finds itself, asks this Court to recognize a general contribution cause of action. However, the recognition of such a general contribution cause of action, without clearly differentiating the fundamentally different situation involved in contribution claims against settling defendants, could have substantial adverse effects on the undersigned *amici curiae,* who settled in good faith with the class plaintiffs and thought that they had thereby bought peace with respect to the suits in question. They plainly have a fundamental interest in ensuring that, whatever the decision of the Court on the existence of contribution on the facts of this case, it should not establish a cause of action for contribution against settling antitrust defendants.

SUMMARY OF ARGUMENT

Although there has been a difference of opinion among the lower courts on the question of whether contribution in any form should be recognized in antitrust actions, no federal court has recognized a cause of action for contribution against settling antitrust defendants.

Settlements (which are recognized as a favored method of resolving litigation and disputes) would be deterred if this Court established a contribution cause of action against settling defendants. If a defendant considering settlement knew that even after settlement he still faced ongoing potential litigation and liability for contribution, he would have little incentive to settle.

Imposition of contribution liability on defendants (like these *amici curiae*) who settled in good faith and thought that they had made their peace with plaintiffs would also be contrary to the very fairness which petitioner claims contribution would achieve. In such circumstances, defendants

would have settled in order to obtain peace without receiving any of the advantages of settlement in return.

In addition, a contribution cause of action against settling antitrust defendants would complicate and lengthen already burdensome litigation. Contribution claims against settling defendants would in all likelihood need to be adjudicated in a second separate proceeding, in which the issue of any settling defendant's liability would have to be litigated without any benefit from the first trial.

ARGUMENT

Although the third-party complaints for contribution dismissed in the *Texas Industries* case were directed solely against non-defendants, petitioner has framed the issue on appeal in far more sweeping terms—i.e., whether an abstract "right" of "contribution" should be recognized in antitrust cases. However, contrary to petitioner's broad statement of the question, "contribution" is not an indivisible concept. Instead, it is merely a term used to refer to a variety of fundamentally different claims arising in a variety of factual situations.

Thus, it is true that questions such as whether an antitrust defendant should be permitted to implead or file an independent action for contribution against a non-defendant (the question presented in this case), or whether the disproportionate collection of an antitrust judgment against one defendant should entitle that defendant to sue fellow judgment debtors in order to equalize payment of the judgment, or whether an antitrust defendant who has settled with plaintiff is subject to claims for contribution, all in some sense involve "contribution". But each question raises different policy considerations, so that even if "contribution" were permissible in one situation, it may nonetheless be inappropriate in another.

In this case "contribution" surfaces in the context of *one* of the above scenarios, i.e., a third-party complaint against an unnamed, alleged co-conspirator not party to the original action. By framing the question before the Court in broad terms, however, petitioner raises a question whose resolution could directly, or by implication, have a great impact on persons (such as the undersigned *amici*) in distinctly different factual positions. Whatever may be the propriety of contribution in other situations, and irrespective of the Court's decision on the particular facts in *Texas Industries,* a contribution cause of action against settling antitrust defendants would so seriously threaten the rights of litigants and the efficient administration of the courts that it should be rejected by the Court. And, indeed, while there has been a difference of opinion among the lower courts on the question of whether contribution in any form should be recognized in antitrust actions, *no federal court has recognized a cause of action for contribution against settling antitrust defendants.* (See *infra,* pp. 10-11.)

There are cogent reasons why this Court should not judicially establish a contribution cause of action against *settling* defendants, whatever its decision on the specific facts here. Courts have consistently recognized the desirability of settlements, particularly in complex cases such as antitrust litigation. But if an antitrust defendant contemplating settlement knew that even after settlement he still faced ongoing potential litigation and liability for contribution, his incentive to settle would be effectively eliminated. Far from obtaining the peace and certainty associated with settlements, he would remain subject to indeterminate liability for contribution and be exposed to the expense and burden associated with litigating the contribution claims brought against him. Settlements would thus under-

standably—and to the detriment of the judicial system—be deterred. For these reasons, as more fully shown in Section I, *infra,* numerous courts confronted with the question have refused to impose contribution liability on a settling defendant.

Regardless of any advantages which might be urged for contribution in other contexts, imposing contribution liability on defendants who settled in good faith and at arms-length would only create gross inequities (see Section II, *infra*). Such defendants enter into settlements in order to dispose completely of the litigation and to buy their peace. If contribution claims against them were allowed, they would be in the position of paying substantial sums without receiving any of the advantages of settlement in return.

Finally, as shown in Section III, *infra,* establishing a contribution cause of action against settling defendants would aggravate the already formidable problems of judicial administration raised by complex antitrust litigation. As the *Corrugated Container* litigation illustrates, whatever might be the situation with respect to other types of contribution claims, contribution claims raised against settling antitrust defendants would normally have to be tried separately after resolution of the disputes between plaintiffs and non-settling defendants. Then, entry of a judgment against a non-settling defendant would necessitate a second complex antitrust proceeding; and, since the settling defendant would not have been a party to the original proceeding, the issue of its liability to the non-settling defendant would have to be litigated *ab initio.* Allowing contribution against settling antitrust defendants would therefore greatly expand the number and duration of complex antitrust suits brought in the federal courts.

I.

A CONTRIBUTION CAUSE OF ACTION AGAINST SETTLING ANTITRUST DEFENDANTS WOULD DETER SETTLEMENTS

Settlement not only represents a mutually acceptable compromise between the parties, but also "contribute[s] greatly to the efficient utilization of . . . scarce judicial resources." *Cotton* v. *Hinton,* 559 F.2d 1326, 1331 (5th Cir. 1977); *D. H. Overmyer Co.* v. *Loflin,* 440 F.2d 1213 (5th Cir.), *cert. denied,* 404 U.S. 851 (1971). Therefore, it is not surprising that settlement has long been recognized as a favored method of resolving litigation and disputes. *Williams* v. *First National Bank,* 216 U.S. 582 (1910); *St. Louis Mining & Milling Co.* v. *Montana Mining Co.,* 171 U.S. 650 (1898). Judicial support for settlements has continued unvaryingly. See, e.g., *Zenith Radio Corp.* v. *Hazeltine Research, Inc.,* 401 U.S. 321, 346-48 (1971).

In complex suits, such as class action antitrust actions, the reasons supporting the desirability of settlements are even more compelling. As the court declared in *Van Bronkhorst* v. *Safeco Corp.,* 529 F.2d 943, 950 (9th Cir. 1976):

> It hardly seems necessary to point out that there is an overriding public interest in settling and quieting litigation. This is particularly true in class action suits which are now an ever increasing burden to so many federal courts and which frequently present serious problems of management and expense. [Footnotes omitted.]

See also *Schlegel Manufacturing Co.* v. *USM Corp.,* 525 F.2d 775 (6th Cir. 1975), *cert. denied,* 425 U.S. 912 (1976).

However, if a defendant considering settlement faced the prospect of further litigation of contribution claims after making his settlement payment, he would have little if any

incentive to settle. The benefits to an antitrust defendant of settling include relief from time-consuming and costly litigation (which often disrupts normal business operations) and agreeable compromise of a potential liability. But if a defendant remained liable for contribution after his settlement, he would be unable to limit the potential size of his liability. Moreover, defense of a contribution claim would force him back into the very dispute from which he sought peace. Settlement would lose that characteristic most meaningful to settlors—final and complete termination of potential liability in the case. *Sabre Shipping Corp.* v. *American President Lines, Ltd.*, 298 F.Supp. 1339, 1346 (S.D.N.Y. 1969). "Defendants [would] have little incentive to buy peace from plaintiffs if they may be obliged to litigate the same claims against other defendants." *In re Corrugated Container Antitrust Litigation,* 84 F.R.D. 40, 41 (S.D. Tex.), *aff'd per curiam,* 606 F.2d 319 (5th Cir. 1979), *cert. dismissed,* No. 79-972 (Oct. 20, 1980).

Since contribution would frustrate settlements, a valuable method for relieving courts of the congestion caused by complex antitrust cases would be crippled. When parties are eliminated from litigation at an early stage of the proceedings (or indeed at any time prior to trial), there are substantial cost savings to the parties and the judicial system. But if contribution were allowed against settling defendants, those seeking settlement would in effect be held ransom as long as any of their co-defendants preferred the risks and uncertainties of trial over settlement. Partial and overall settlements would accordingly be thwarted. Moreover, it is unrealistic to assume that early, overall settlements could be reached at one stroke, especially in antitrust price-fixing cases, typically having many plaintiffs and co-defendants and an unknown number of third-party defendants.

Contribution claims against settling antitrust defendants have been uniformly rejected. E.g., *Sabre Shipping Corp.* v. *American President Lines, Ltd., supra* (denying contribution and indemnification sought by five non-settling defendants who impleaded seventeen settlors as third-party defendants); *In re Ampicillin Antitrust Litigation,* 82 F.R.D. 647, 649 (D.D.C. 1979) (cross-claims for contribution against settling co-defendant rejected; contribution would undermine incentive to settle, since settling defendant was motivated to settle by a desire to "end its participation in this litigation"); *Hedges Enterprises* v. *Continental Group, Inc.,* 1979-1 Trade Cases ¶ 62,717 (E.D. Pa.) at 77,993 (it "would be futile to allow an amendment [of answer to assert cross-claim] because there is no right to contribution as against settling codefendants in antitrust litigation"); *In re Corrugated Container Antitrust Litigation, supra* (permitting cross-claims for contribution would frustrate settlements).[2]

Indeed, the only case permitting any form of contribution in an antitrust action, *Professional Beauty Supply, Inc.* v. *National Beauty Supply, Inc.,* 594 F.2d 1179 (8th Cir. 1979), decided by a divided panel, did not involve a settling defendant at all. There the defendant, one of two alleged conspirators, sought to assert a right of contribution against a third-party non-defendant. No settlements had been made, and there was an allegation that the third-party

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[2] See also *In re Fine Paper Antitrust Litigation,* M.D.L. No. 323 (E.D. Pa. Aug. 3, 1979); *Alabama* v. *Blue Bird Body Co.,* No. 75-23-N (M.D. Ala. June 22, 1979), *appeal docketed,* No. 79-2667 (5th Cir. July 26, 1979). Other antitrust cases rejecting contribution claims include: *Olson Farms, Inc.* v. *Safeway Stores, Inc.,* 1979-2 Trade Cases ¶ 62,995 (10th Cir.), *en banc rehearing granted,* No. 77-2068 (Dec. 27, 1979); *In re Beef Industry Antitrust Litigation,* 607 F.2d 167 (5th Cir. 1979), *petition for cert. pending sub nom. Iowa Beef Processors, Inc.* v. *Meat Price Investigators Ass'n,* No. 79-1214 (filed Feb. 6, 1980); *El Camino Glass* v. *Sunglo Glass Co.,* 1977-1 Trade Cases ¶ 61,533 (N.D. Cal. 1976).

defendant had used its economic influence to prevent the plaintiff from including it as a defendant. The Eighth Circuit held that "under certain circumstances" an antitrust defendant may be entitled to contribution from other joint tortfeasors. However, in responding to the contention that contribution might serve as a possible deterrent to settlement, the majority indicated that it would not have permitted contribution against settling defendants (594 F.2d at 1184):

> The problem of how to treat a joint tortfeasor who has settled in good faith is not present in this case. However, in the proper case the court should be able to fashion a rule of contribution which will protect the rights of settling defendants. [Citations omitted.]

Cases decided subsequent to *Professional Beauty Supply* have in fact interpreted the decision as precluding contribution against settling defendants. E.g., *In re Fine Paper Antitrust Litigation,* M.D.L. No. 323 (E.D. Pa. Aug. 3, 1979); *Alabama* v. *Blue Bird Body Co.,* No. 75-23-N (M.D. Ala. June 22, 1979), *appeal docketed,* No. 79-2667 (5th Cir. July 26, 1979).[3]

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[3] In contrast with the antitrust statutes, certain federal securities statutes provide that contribution can be asserted against "any person who, if sued separately, would have been liable to make the same payment." Securities Act of 1933, § 11(f), 15 U.S.C. § 77k(f); Securities and Exchange Act of 1934, §§ 9(e), 18(b), 15 U.S.C. §§ 78i (e), 78r(b) (similar language). With the recognition of implied rights of action under other sections of the securities laws, analogous contribution causes of action were also recognized. *Heizer Corp.* v. *Ross,* 601 F.2d 330 (7th Cir. 1979); *Globus, Inc.* v. *Law Research Service, Inc.,* 318 F.Supp. 955 (S.D.N.Y. 1970), *aff'd per curiam,* 442 F.2d 1346 (2d. Cir.), *cert. denied,* 404 U.S. 941 (1971). This statutory background alone distinguishes contribution under the securities laws from that which might be implied under the antitrust laws. *Newark Motor Inn Corp.* v. *Holiday Inns, Inc.,* 1980-2 Trade Cases ¶ 63,465, at 76,457-58 (D.N.J.).

(footnote continued on next page)

Although petitioner Texas Industries, Inc. argues for a broadly stated "right" of "contribution", it advances no arguments that support the imposition of contribution liability on settling defendants. Indeed, in discussing methods of apportioning liability under a contribution rule, petitioner declares that "settling defendants must be relieved of any further liability" and urges adoption of a "rule that reduces the claim of a plaintiff who settles." (Petitioner's Brief at 27.) Such "claim reduction" (or "carve out")—which is also advocated by a number of *amici curiae*[4]—removes the settling defendant's share of liability from the plaintiff's claim.

"Claim reduction" of the type urged by petitioner and various *amici* has been implemented in certain non-antitrust

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Although the statutory language has led some district courts to recognize a contribution cause of action against settling defendants, these decisions have not actually implemented such contribution. See *McLean* v. *Alexander*, 449 F.Supp. 1251 (D. Del. 1978), *rev'd on other grounds*, 559 F.2d 1190 (3d Cir. 1979); *Muth* v. *Dechert, Price & Rhoads*, 391 F. Supp. 935, 939 (E.D. Pa. 1975); *Altman* v. *Liberty Equities Corp.*, 54 F.R.D. 620, 625 (S.D.N.Y. 1972). Thus, even in the unique area of securities law, it appears that no court has applied federal law to grant the extraordinary relief of forcing settling defendants to pay sums in contribution in addition to the amounts they had already paid in their settlements. See also *Herzfeld* v. *Laventhol, Krekstein, Horwath & Horwath*, 540 F.2d 27 (2d Cir. 1976). In *Herzfeld*, dealing with a situation in which a settlement, for more than the settled defendant's *pro rata* share of the final judgment, had already been reached, the Second Circuit denied contribution against the settling defendant on the grounds that "by the settlement its tort-feasor status had been removed" (540 F.2d at 39), using as an analogy N.Y. Gen. Obligations Law § 15-108(b), which makes good faith settlements a bar to contribution.

[4] *Amici* Georgia-Pacific Corporation, Packaging Corporation of America, The Mead Corporation, Westvaco Corporation, Weyerhaeuser Company and Willamette Corporation all advocate the use

(footnote continued on next page)

decisions dealing with non-statutory rights of contribution or interpreting statutes silent on the status of settling defendants. *In none of these cases, however, was a contribution cause of action recognized against settling defendants; in fact, their very thrust is that a contribution cause of action against a settling defendant is cut off by settlement.*[5] Thus, in *Gomes* v. *Brodhurst,* 394 F.2d 465, 468 (3d Cir. 1967), the Third Circuit, declaring that "[v]oluntary settlements are to be encouraged and a rule permitting contribution . . . would not work to that end," refused to impose contribution liability on a settling defendant. Similarly, in *Judson* v. *Peoples Bank & Trust Co.,* 17 N.J. 67, 110 A.2d 24 (1954), the New Jersey Supreme Court, in an opinion by Mr. Justice Brennan (then Justice of the New Jersey Supreme Court), accorded finality to the settlements which had been reached, and rejected a proposed contribution claim against the settling defendants as having "a stifling effect upon efforts at compromise and settlement, contrary to the policy of our law which strongly favors disposition of disputes by compromise and settlements." 17 N.J. at 92-93, 110 A.2d at 36. In both cases the plaintiff's judgment against a non-settling defendant was to be reduced by an amount which reflected the settling tortfeasor's respective share of fault.

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of claim reduction. See Brief of Georgia-Pacific Corporation and Packaging Corporation of America as Amici Curiae at 25-29; Brief of Amicus Curiae The Mead Corporation in Support of Petitioner Texas Industries, Inc. at 7; Brief of Westvaco Corporation as Amicus Curiae at 11; Brief of Weyerhaeuser Company and Willamette Industries, Inc. as Amici Curiae at 12-15.

[5] Compare *Glus* v. *G. C. Murphy Co.,* 23 Empl. Prac. Dec. ¶ 31,062 (3d Cir. 1980) and *Kohr* v. *Allegheny Airlines, Inc.,* 504 F.2d 400 (7th Cir. 1974), *cert. denied,* 421 U.S. 978 (1975), non-antitrust cases dealing with contribution claims by settling defendants against non-settling defendants in certain circumstances not applicable here.

See also *Leger* v. *Drilling Well Control, Inc.*, 592 F.2d 1246 (5th Cir. 1979) (maritime personal injury case not covered by Longshoremen's and Harbor Worker's Act); *Martello* v. *Hawley*, 300 F.2d 721 (D.C. Cir. 1962) (applying law of District of Columbia); *Doyle* v. *United States*, 441 F.Supp. 701, 710-13 n.5 (D.S.C. 1977).

In fact, the modern trend in those states recognizing contribution (whether at common law or by statute) is against imposing contribution on settling defendants, with any contribution cause of action cut off by settlement.[6]

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[6] As one commentator has noted, "Nearly every state, in some way, protects from contribution the settling defendant who has been released by the plaintiff." Sellers, *Contribution in Antitrust Damage Actions*, 24 Vill. L. Rev. 829, 855 (1979) (footnote omitted).

The experience of the ten most populous states is illustrative. Of those, nine states exempt settling defendants from contribution liability by either statute or court decision (California, Cal. Civ. Proc. Code § 877; Florida, Fla. Stat. Ann. § 768.31; Illinois, Ill. Rev. Stat. Ann. (Supp. 1980) ch. 70, § 302; Massachusetts, Mass. Gen. Law Ann., Chap. 231B, § 4; Michigan, Mich. Comp. Laws Ann. § 600.2925d; New Jersey, *Judson* v. *Peoples Bank & Trust Co.*, 17 N.J. 67, 110 A.2d 24 (1954); New York, N.Y. Gen. Obligations Law § 15-108(b); Ohio, Ohio Rev. Code Ann. § 2307.32; Texas, Texas Rev. Civ. Stat. Ann. art. 2212a §§ 2(d), 2(e)); while only one of those states recognizes a right to contribution against settling defendants, under the statute it adopted in 1951 (Pennsylvania, 42 Pa. Cons. Stat. Ann. § 8327).

Two of the states present an interesting and informative contrast. Texas, by judicial decision, rejected contribution against settling defendants. *Palestine Contractors, Inc.* v. *Perkins*, 386 S.W.2d 764 (Tex. 1964). As noted above, this decision was codified in legislation which was adopted in 1973. New York, on the other hand, initially adopted a broad contribution policy that would apparently apply to all defendants, including those who settled. *Dole* v. *Dow Chemical Co.*, 30 N.Y.2d 143, 331 N.Y.S.2d 382, 282 N.E.2d 288 (1972). The New York legislature moved quickly to

(footnote continued on next page)

Moreover, experience in certain states where contribution against settling defendants has been statutorily permitted demonstrates the potentially destructive effect on antitrust settlements of contribution against settling parties. The 1939 Uniform Contribution Among Tortfeasors Act (U.C.A.T.) permitted contribution against settling defendants. However, the 1955 revised U.C.A.T. changed the rule to provide:

> When a release or covenant not to sue or not to enforce judgment is given in good faith . . . [i]t discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor.

The Commissioners' Note to § 4 of the revised Act stated that the 1939 provision permitting contribution against settling defendants was "one of the chief causes for complaint where the Act has been adopted, and one of the main objections to its adoption." It added that the effect of that provision of the 1939 Act had been "to discourage settlements in joint tort cases, by making it impossible for one tortfeaser alone to take a release and close the file."[7]

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reverse that portion of *Dole* applying contribution liability to settling defendants by enacting the above-cited legislation in 1974.

[7] The 1955 Act has been adopted by eleven states. The Uniform Comparative Fault Act was promulgated in 1977 as an alternative to the 1955 Act for those states adopting the comparative fault principle. Uniform Comparative Fault Act, Commissioners' Prefatory Note, reprinted in 12 Uniform Law Ann. 32 (Supp. 1980). The Uniform Comparative Fault Act imposes liability on the basis of the proportionate fault of the parties involved. *Id.* Section 6 of the Act provides in part that a release, covenant not to sue or similar agreement entered into by a claimant and a person liable "discharges that person from all liability for contribution . . . ." Section 6 also adopts a form of claim reduction by providing that the claim of the releasing person against other persons "is reduced by the amount of the released person's equitable share of the obligation," determined in accordance with other provisions in the Act. *Id.* at 41.

Courts and legislatures have thus recognized the detrimental effect that a right of contribution against settling defendants would have on settlements. Whatever the merits of contribution against non-settling defendants or alleged third-party co-conspirators, it plainly is inappropriate against defendants who have compromised their antitrust claims with plaintiffs.

Even those advocating a broad right of contribution in antitrust cases have not proposed that it be extended to settling defendants. A bill permitting contribution against non-settling defendants and third parties in price-fixing cases was introduced in Congress in May 1979. It was subsequently reported out of committee in November 1979. S. 1468, 96th Cong., 1st Session (1979). The bill expressly excluded defendants who entered into settlements in good faith.[8] See also Resolutions and Report of the Section of Antitrust Law of the American Bar Association on Proposed Amendment of the Clayton Act to Permit Contribution in Damage Actions Brought Thereunder (Aug. 17, 1979), reprinted in 936 *Antitrust & Trade Reg. Rep.* (BNA)

[8] The introduction of S. 1468 underscores the wisdom of deferring to Congress on the question of contribution among antitrust tortfeasors generally and against settling defendants in particular. Formulating a comprehensive and coherent contribution rule for all antitrust cases requires resolution of a myriad of interdependent issues, many of which are not before the Court on this petition. Among those issues are: the types of antitrust violations for which contribution would be allowed, the basis of apportionment among non-settling defendants in each kind of case, and the availability of claim reduction. In addition, many of the issues raised or sought to be raised by the petition turn on the resolution of empirical questions which Congress is better equipped to answer—questions concerning, for example, the settlement impact of contribution and claim reduction, the deterrent impact of a contribution as compared to a no-contribution rule, and the prevalence and causes of so-called "whipsaw" settlements.

E-1, at p. E-3 (proposed statute would prohibit contribution by or against a settling defendant; "To make certain contribution rights do not discourage settlements, it is essential to permit a party to settle a case once and for all"); Note, *Contribution in Private Antitrust Actions,* 93 Harv. L. Rev. 1540, 1551-55 (1980).

II.

A CONTRIBUTION CAUSE OF ACTION AGAINST SETTLING ANTITRUST DEFENDANTS WOULD NOT PROMOTE FAIRNESS

In sanctioning contribution in the particular factual situation before it, the Eighth Circuit in *Professional Beauty Supply, supra,* sought to achieve "fairness between the parties" and "justice"; it felt that those ends are not served when one tortfeasor is permitted to shoulder more than its share of responsibility "because of the plaintiff's whim or spite [in not naming an alleged co-conspirator as a co-defendant], or his collusion with the other wrongdoer." 594 F.2d at 1185-86 (citation omitted). But this concern over the accused going free—which pervades petitioner's brief (e.g., pp. 16-18)—is inapplicable where settling defendants are involved, since they will have already resolved the plaintiffs' claims against them. *In re Ampicillin Antitrust Litigation, supra,* 82 F.R.D. at 650.

In the *Corrugated Container* litigation, for example, defendants have already paid $300 million to plaintiffs—even though they deny any liability. By no stretch of the imagination can it be said that they have escaped scot-free or colluded with plaintiffs. Indeed, *amicus curiae* Mead characterizes those settlements as "extortionate". (Brief of Amicus Curiae The Mead Corporation in Support of Petitioner Texas Industries, Inc. at 12.) Moreover, all those settlements, except those not yet ruled upon, have been found fair and reasonable by the District Court in carrying

out its responsibilities on behalf of the class in accordance with Rule 23 of the Federal Rules of Civil Procedure.

Although petitioner argues that contribution will ensure "good faith settlements based upon the merits of the case" (Petitioner's Brief at 19), and although certain *amici* complain of the coercive tactics used by plaintiffs' counsel in antitrust cases, particularly class actions, leading to settlement "stampedes",[9] they do not suggest how a contribution cause of action against settling defendants will lead to fair settlements. Indeed, petitioners and those *amici* never even address this issue, asserting instead that the interests of settling defendants in obtaining peace can be achieved through the application of "claim reduction" (or "carve out")—a markedly different concept than contribution.[10]

Petitioner therefore in effect concedes that, far from promoting fairness, a contribution cause of action against settling defendants would only create great inequities. Those inequities are illustrated in stark fashion in the *Corrugated Container* litigation. Defendants there entered into settlement agreements and paid unprecedented sums

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[9] See Brief of Amicus Curiae The Mead Corporation in Support of Petitioner Texas Industries, Inc. at 8-11, 16-19; Brief of Georgia-Pacific Corporation and Packaging Corporation of America as Amici Curiae at 6-14; Brief of Westvaco Corporation as Amicus Curiae at 9-11.

[10] See Petitioner's Brief at 26-27 (advocating a rule that reduces the claim of a plaintiff who settles with one of multiple defendants by the settling defendant's *pro rata* share, and releases the settling defendant from any further liability); Brief of Amicus Curiae The Mead Corporation in Support of Petitioner Texas Industries, Inc. at 7; Brief of Georgia-Pacific Corporation and Packaging Corporation of America as Amici Curiae at 25-29; Brief of Westvaco Corporation as Amicus Curiae at 11; Brief of Weyerhaeuser Company and Willamette Industries, Inc. as Amici Curiae at 12-15.

in order to settle completely all class plaintiffs' claims in that litigation and thereby avoid the disruption, inconvenience and expense of preparing for and undergoing trial, as well as the risk of potential judgment liability for the massive amounts being claimed by plaintiffs. Although they understood that they had fully discharged their liability to the plaintiff class and bought their peace, they would achieve neither benefit of settlement if settling defendants were made subject to contribution and if such a rule were retroactively applied to these defendants. And since due process requires that settling defendants be given their "day in court" on the issue of culpability prior to any imposition of contribution, they would find themselves right back in the thick of further protracted litigation if the trial verdict in favor of the plaintiffs were upheld on appeal and if settling defendants were subject to contribution. In sum, establishment of a contribution cause of action against settling defendants could frustrate both of the major reasons which led these *amici* to enter into the settlements.

To permit contribution against settling defendants would consequently create unfairness where there are no competing equities. Compelling defendants once again to undertake the expenses and risks of litigation would represent a clear and substantial hardship and engender the very unfairness contribution is designed to prevent.

III.

A CONTRIBUTION CAUSE OF ACTION AGAINST SETTLING ANTITRUST DEFENDANTS WOULD COMPLICATE AND LENGTHEN ALREADY BURDENSOME LITIGATION

This Court has recently reaffirmed the importance of considering burdens on judicial administration when decid-

ing rules of antitrust law. *Illinois Brick Co.* v. *Illinois,* 431 U.S. 720 (1977). Permitting contribution claims against settling defendants would significantly complicate and further protract antitrust litigation which already places enormous strains on the federal court system.

A settling defendant facing potential liability for contribution claims would be forced back into litigation—either in the same case from which the settling defendant had sought to extricate himself or, more likely, *in a further action following the completion of the first case.* While compelling any defendant to remain a party to antitrust litigation inevitably consumes more court time and adds more complexity to the case, the bizarre position that settling defendants would find themselves in (i.e., settled with the plaintiffs but in controversy with the defendants who have not settled) would increase the complexity of the case by several orders of magnitude.

Such complexity would almost invariably require that contribution claims against settling defendants be tried in a separate set of complex proceedings, undertaken *after* adjudication of plaintiffs' remaining disputes against non-settling defendants, but without benefit of any of the findings of fact made at the first trial.[11] Indeed, non-settling defendants would argue that a single trial embracing contribution claims against settling defendants would put them

[11] Rule 42(b) of the Federal Rules of Civil Procedure provides the authority to order a separate trial of third party claims ". . . in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy . . . ." See, e.g., *Piedmont Interstate Fair Ass'n* v. *Bean,* 209 F.2d 942 (4th Cir. 1954); *Shippers Pre-Cooling Service* v. *Macks,* 181 F.2d 510 (5th Cir.), *cert. denied,* 340 U.S. 816 (1950); *In re Paris Air Crash of March 3, 1974,* 69 F.R.D. 310 (C.D. Cal. 1975); *Beights* v. *W. R. Grace & Co.,* 67 F.R.D. 81 (W.D. Okla. 1975).

in an awkward and difficult position: they would be compelled to argue that they were not guilty of any Sherman Act violation, while at the same time contending that *if* they did participate in such a violation, the settling defendants were also participants. Likewise, settling defendants would find themselves in the posture of arguing their innocence of wrongdoing while claiming, in the alternative, that non-settling defendants were primarily responsible for any wrongdoing.

A likely separate trial on the contribution claim against settling defendants should be contrasted with the situation in which contribution is sought against a *non*-settling defendant. Such a defendant, whether brought into the original suit initially by the plaintiff or impleaded by the other defendant(s) (e.g., *Professional Beauty* and this case), would have had his liability—i.e., whether or not he participated in a Sherman Act violation which caused plaintiff injury—already determined at trial. Similarly, in a contribution suit between judgment debtors designed to rectify the disproportionate collection of the judgment against the contribution claimant, there would be no need for a further proceeding to determine the question of guilt or innocence, which would already have been resolved by the judgment involved. Thus, imposing contribution liability on settling defendants would create unique and serious problems for the judicial administration of already complex cases.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Court should not, directly or by implication, establish or recognize a cause of action for contribution against settling antitrust defendants.

Dated: January 16, 1981.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

TEXAS INDUSTRIES, INC., *Petitioner,*

v.

RADCLIFF MATERIALS, INC., ET AL., *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

AND BRIEF *AMICUS CURIAE*

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

River Cement Company hereby respectfully moves for leave to file the attached brief *amicus curiae* in this case, in support of respondents. The written consent of the attorney for the respondents has been obtained. The consent of the two attorneys for the petitioner was requested, but they have not yet responded to the request.

The interest of River Cement Company in this cause arises from the fact that it is a defendant in a multidistrict class action presently pending in the United States District Court for the District of Arizona in which the same issue is before the court; namely, whether a defendant in a federal antitrust case may seek contribution. *In re Cement and Concrete Anti-*

trust Litigation, No. CIV 76-488A-PHX CAM; MDL 296 (D. Ariz.).

In the instant case petitioner is seeking to assert a third-party claim for contribution against alleged co-conspirators which the plaintiff chose not to sue. The parties in their arguments below, and the Court of Appeals in its opinion, focused on the antitrust enforcement consequences of the fact that a private antitrust plaintiff need not sue all coconspirators but may choose to proceed against any one or more of them. The impact of a right to contribution on antitrust settlements and the resulting consequences for antitrust enforcement, was neither involved nor addressed below, and it is unlikely that it will be emphasized by the parties here.

River Cement Company has settled with the plaintiff classes in its case, but is now faced with a cross claim for contribution which its non-settling co-defendants seek to assert. The brief which *amicus curiae* is requesting permission to file contains an argument on the likely effect a right to contribution would have on settlements and their important role in antitrust enforcement. That argument likely will not otherwise be made, and it addresses an important policy issue which ought to be considered in reaching a decision here.

Respectfully submitted,

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TABLE OF CONTENTS

	Page
Motion for Leave to File Brief *Amicus Curiae*	i
Brief *Amicus Curiae*	1
Interest of the *Amicus Curiae*	2
Summary of Argument	4
Argument	4
Conclusion	8

TABLE OF AUTHORITIES

CASES:

Gomes v. *Brodhurst,* 394 F.2d 465 (3d Cir. 1967).... 5, 6

In re Cement and Concrete Antitrust Litigation, No. CIV 76-488A-PHX CAM; M.D.L. 296 (D. Ariz.) .i, ii, 2

STATUTES:

California Civil Procedure Code § 877(b) (West) 6

New York General Obligations Law § 15-108(b) (McKinney) 6

Uniform Contribution Among Joint Tortfeasors Act.. 6

LEGISLATIVE MATERIALS:

Senate Bill No. 1468 .....5, 6, 7

Senate Report No. 96-428, 96 Cong., 1st Sess. (1979) .. 5

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BRIEF OF RIVER CEMENT COMPANY, *AMICUS CURIAE*

River Cement Company ("River") submits this brief *amicus curiae* to focus the Court's attention upon certain important policy considerations that are of particular concern to small and medium sized antitrust defendants. The narrow question before the Court is whether petitioner may assert a third-party claim for contribution against respondents in a price fixing action brought against petitioner alone. Because none of the alleged coconspirators have settled the price fixing claims, the question of how recognition of a right to contribution would impact antitrust settlements, and

the resulting consequences for antitrust enforcement might be left for a subsequent case. River urges, however, that the Court take into account the concerns of settling antitrust defendants, and the important policy considerations served by their settlements, in reaching its decision in this case.

INTEREST OF THE *AMICUS CURIAE*

River is one of several dozen defendants in a consolidated multi-district class action against the cement industry,[1] in which plaintiffs seek damages for defendants' alleged price fixing. River is engaged solely in the cement business; its share of the national cement market is relatively small (less than 2%); and it has never conducted business anywhere near Arizona.

River has denied liability throughout the 4½ year pendency of that proceeding, which is yet only in the initial discovery stage. However, as one of the smaller defendants, the expense of remaining enmeshed in protracted and complex litigation far from its operations proved excessively burdensome. Hence, River became the first defendant to settle, executing an agreement dated July 10, 1979, whereby plaintiffs relinquished all of their claims against River for a payment of $1.75 million.[2]

Although, as the Settlement Agreement expressly states, the parties believed that no right of contribu-

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[1] *In re Cement and Concrete Antitrust Litigation;* No. CIV 76-488A-PHX CAM; M.D.L. 296 (D. Ariz.).

[2] The settlement received preliminary approval from the court on October 20, 1980. The hearing on final approval will be held on February 3, 1981, in conjunction with the only other settlements (three) which have been reached.

tion exists among antitrust defendants, River sought to incorporate in the Agreement a measure of protection against contribution if a court should conclude otherwise. River first asked plaintiffs to delete River's sales from their claims against the non-settling defendants, but plaintiffs would not settle on that basis. However, plaintiffs did ultimately agree to reduce any final judgment they obtained against any other defendant by the amount of any judgment for contribution which such other defendant obtained against River. Quite plainly, such an agreement did not fully protect River against the risk of contribution. River remained vulnerable to a crossclaim or to a separate action for contribution brought by any or all of its (non-settling) co-defendants. Faced with the expense of further litigation, River chose to rely on the then-existing weight of authority denying contribution in antitrust cases and acceded to plaintiffs' terms. Possibly encouraged by this Court's decision to review the contribution question, the non-settling defendants have now moved to supplement their answers by asserting a crossclaim for contribution against River which, if allowed, would again saddle River with the expense of defending a case it agreed to settle eighteen months ago.

River's interest here is plainly substantial. Permitting a right of contribution to be asserted against a defendant who has already settled would destroy the very repose which River sought to achieve through settlement. At the same time, River is especially sensitive to the chilling effect recognition of a right to contribution is likely to have upon future settlements—particularly if non-settling defendants may press contribution claims against settling defendants, rather than being confined to seeking a reduction in the amount claimed

by settling plaintiffs.[3] River, on behalf of settling antitrust defendants, asks the Court to deny the right of contribution; or, at the very least, to qualify any right of contribution by holding it inapplicable against a party who settles in good faith, in order to minimize the impact of a right to contribution on the settlement of antitrust cases, and to avoid hampering private enforcement of the antitrust laws.

SUMMARY OF ARGUMENT

Recognition of a right to seek contribution against antitrust defendants which settle in good faith would virtually eliminate the settlement of antitrust claims; would seriously hamper the private enforcement of the antitrust laws; and would significantly impair the ability of the smaller companies in an industry to compete.

ARGUMENT

Because River has already settled, it would be inappropriate for us to dwell at length on the reasons that a rule of contribution—even if qualified by claim reduction—would severely impede the settlement process. River's concerns about contribution center on the inequitable retroactive impact on its settlement if contribution claims could be asserted against settling defendants. These concerns—and undoubtedly the concerns of numerous similarly situated settling defendants in other cases—would be removed if the Court fashioned a rule of claim reduction to take account of any settlements and barred the assertion of contribution claims against settling defendants.

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[3] "Claim reduction" refers to a reduction of plaintiff's total recoverable damages by an amount equal to that portion attributable to a settling defendant.

Nevertheless, we wish to point out that even adding the principle of claim reduction to a rule of contribution might not eliminate the chilling effect such a rule would have upon settlements. Senators Kennedy and Metzenbaum, commenting on S. 1468 (the contribution bill pending in Congress), offered the following cogent observation:

> The small defendant must be able to settle early in the litigation for an affordable amount. Mandatory claim reduction will discourage plaintiffs from settling with small and relatively financially weak companies early in the litigation. Small companies will be unable to escape potentially bankrupting liability and huge legal expenses as they do now through early settlement.
>
> Report of the Committee of the Judiciary, United States Senate, on S. 1468, together with Supplemental Views, S. Rep. No. 96-428, 96 Cong., 1st Sess. (1979), at 31.

Thus, even when qualified by claim reduction, a rule of contribution might in practice compel the small antitrust defendant, whose interest would best be served by early settlement, to proceed nevertheless with expensive and potentially destructive litigation. Permitting contribution against settling defendants without such a qualification, however, would virtually eliminate the settlement of antitrust claims. As the Third Circuit stated, in refusing to recognize a right to contribution against settling tortfeasors but adopting claim reduction in negligence cases:

> Voluntary settlements are to be encouraged and a rule permitting contribution under such circumstances would not work to that end. Not only would a joint tortfeasor defendant be stripped of any incentive to settle but he would have a positive in-

> centive to stand trial and actively participate in his defense in order to minimize his liability. *Gomes* v. *Brodhurst,* 394 F.2d 465, 468 (3rd Cir. 1967).

It is precisely such concerns which have led many states to adopt laws patterned after the Uniform Contribution Among Joint Tortfeasors Act, § 4, 12 U.L.A. 98 (1975), which provides:

> When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury . . . . (b) [i]t discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor.[4]

Such concerns also prompted Congressional advocates of antitrust contribution to deny contribution rights against settling defendants and to include claim reduction, in their proposed legislation.[5]

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[4] *See, e.g.,* Cal. Civ. Proc. Code § 877 (b) (West); N.Y. Gen. Oblig. Law § 15-108(b) (McKinney). The Uniform Act (§ 4(a)) and the California Statute credit a non-settling defendant with the amount of any settlements by co-tortfeasors. The New York Statute reduces the plaintiff's claim against non-settling defendants by the greater of the settlement amount or the settling defendants' equitable share of the plaintiffs damages.

[5] *See, e.g.,* the relevant portions of S. 1468:

> (b) A release or a covenant not to sue or not to enforce a judgment received in settlement by one of two or more persons subject to contribution under this section shall not discharge any other persons from liability unless its terms expressly so provide. The court shall reduce the claim of the person giving the release or covenant against other persons subject to liability by the greatest of: (1) any amount stipulated by the release or covenant, (2) the amount of consideration paid for it, or (3) treble the actual damages attributable to the settling person's sales or purchases of goods or services.

(*footnote continued on next page*)

Numerous briefs have already been submitted to this Court demonstrating that claim reduction is a necessary corollary to any rule of contribution, and that such an approach finds support in the case law, the commentaries and the halls of Congress. Indeed, even petitioners,[6] and most of the *amici* supporting them,[7] concede as much. As a small antitrust defendant, however, River wishes to add its voice to the chorus by emphasizing that unless the impact of the decision in this case upon the antitrust settlement process is considered, there is a risk that havoc may be wreaked upon that process. Much has been said by *amici* supporting petitioners about the coercive effects which a no contribution rule has on defendants who do not wish to settle. River's experience suggests, however, that the threat of contribution can be a device used by large corporate defendants to maximize their own bargaining position at the expense of smaller defendants—which do not have comparable resources to bear the burden of defending against a class action antitrust

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(*continued*)

> Under item (3) above, actual damages shall not be trebled in proceedings under section 4A of this Act.
>
> (c) A release or covenant, or an agreement which provides for a release or covenant, entered into in good faith, relieves the recipient from liability to any other person for contribution, with respect to the claim of the person giving the release or covenant, or agreement, unless the settlement provided for in any such release, covenant, or agreement is not consummated.

[6] *See* Brief of Texas Industries, Inc., at 26-27.

[7] *See* Brief of The Mead Corporation, at 7; Brief of Georgia-Pacific Corporation and Packaging Corporation of America, at 25-29; Brief of Olson Farms, Inc., at 16; Brief of Westvaco Corporation, at 11.

suit—by keeping them from breaking ranks and settling out early. Any right to antitrust contribution which is not at least qualified by a rule which exonerates settling defendants would effectively force smaller defendants against their will to continue to bear the heavy costs of antitrust litigation, and thereby impair their ability to compete—a result that the antitrust laws were expressly designed to avoid.

CONCLUSION

For the reasons stated, River submits that the Court should issue its decision in this case with an eye toward protecting and fostering the antitrust settlement process—by affirming the decision below or, at the very least, by making it clear that no right of contribution exists against defendants which settle in good faith.

Respectively submitted,

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No. 79-1144

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

TEXAS INDUSTRIES, INC.,
Petitioner,

vs.

RADCLIFF MATERIALS, INC., et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF AMICUS CURIAE ON BEHALF OF SAFEWAY STORES, INCORPORATED, IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

	Page
Interest of amicus curiae	1
Summary of the argument	2
Argument	3
Conclusion	9

TABLE OF AUTHORITIES CITED

Cases

	Page
Allbright Bros., Contractors v. Hull-Dobbs Co., 209 F.2d 103	8
Brenham v. Southern Pacific Company, 328 F.Supp. 119, affirmed 469 F.2d 1095, certiorari denied 409 U.S. 1061	8
Cackling Acres, Inc. v. Olson Farms, Inc., 541 F.2d 242	4
Cackling Acres, Inc. v. Olson Farms, Inc., Civ.No. C-292-71 (D.Utah)	3
Cackling Acres, Inc., et al. v. Olson Farms, et al., Civ. No. C-75-472 (D.Utah)	6
Olson Farms, Inc. v. Safeway Stores, Inc., 1979-2 CCH Trade Cases ¶ 62,995	2, 5
Olson Farms, Inc. v. Safeway Stores, Incorporated, Civ.No. C-75-104 (D.Utah)	3, 5
Sabre Shipping Corporation v. American President Lines, 298 F.Supp. 1339	7
W. D. Rubright Co. v. International Harvester Co., 358 F.Supp. 1388	8
Zenith Radio Corp. v. Hazeltine Research, 401 U.S. 321	9

Other Authorities

CCH Trade Reg.Rep., U.S. Antitrust Cases 1970-1979, pp. 53,619-53,620	4
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Prosser, Torts (4th ed. 1971) pp. 308-309	7, 8, 9
Uniform Contribution Among Tortfeasors Act (1955 Rev.) § 1(d)	8

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BRIEF AMICUS CURIAE ON BEHALF OF SAFEWAY STORES, INCORPORATED, IN SUPPORT OF RESPONDENTS

On consent of all parties, Safeway Stores, Incorporated ("Safeway"), submits this brief amicus curiae in support of respondents.

INTEREST OF AMICUS CURIAE

The interest of Safeway in the disposition of the case before this Court, involving the propriety of creating a new right of contribution among alleged antitrust conspirators, arises from the filing of contribution claims against Safeway by Olson Farms, Inc. ("Olson"). Olson, which had previously been determined by a jury to have conspired to fix prices and monopolize in violation of sections 1 and 2 of the Sherman Act, asserted its contribution

claims in two separate actions in the District Court for the District of Utah.

In the first suit the Court of Appeals for the Tenth Circuit affirmed dismissal of an independent action initiated by Olson seeking contribution from Safeway.[1] Dismissal was on the ground that there is no right of contribution under the statutory scheme of the antitrust laws. In an unpublished decision of the same date, the Court of Appeals similarly affirmed dismissal of Olson's second action, a third-party complaint which also sought contribution from Safeway.[2] On December 27, 1979, the Court of Appeals granted Olson's petition for *en banc* rehearing of both decisions and the cases were reargued on September 15, 1980.

This Court's resolution of the instant case could have a significant impact on Safeway's rights in the cases now under *en banc* consideration in the Tenth Circuit. Because those cases present very different circumstances than the *Texas Industries* case, they illustrate the range of consequences that may be produced by any ruling recognizing a new right of antitrust contribution.

SUMMARY OF THE ARGUMENT

As illustrated by the first Tenth Circuit case in which Olson is seeking contribution from Safeway, a new right of Federal antitrust contribution could require separate and successive retrial of antitrust cases against contribution defendants who were not parties to the initial anti-

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[1] *Olson Farms, Inc. v. Safeway Stores, Inc.*, 1979-2 CCH Trade Cases ¶ 62,995 (10 Cir. 1979).

[2] Slip Op. No. 78-1773, Nov. 8, 1979.

trust action, and who were therefore not bound by the original judgment. This would thrust on the Federal courts a whole new category of complex litigation not authorized by Congress.

In addition, as illustrated by the second *Olson* case, a new right to antitrust contribution could permit an antitrust defendant who had settled the original claims against it to assume the garb of a contribution plaintiff and then attempt—by trial of the same antitrust claims it had earlier settled—to obtain contribution toward its settlement.

A right of contribution in these circumstances would lead to unacceptable additional complication of already exceedingly complex litigation, would pose insuperable problems of administration for the Federal trial courts, and could seriously undermine the deterrent value and the effectiveness of the private treble-damage remedy.

ARGUMENT

The unacceptable consequences of creating a new right to antitrust contribution are illustrated by the facts of the pending actions against Safeway:

1. *Olson Farms, Inc. v. Safeway Stores, Incorporated, et al.* (D.Utah, Civ. No. C-75-104).

In 1971, egg producers in Utah commenced an antitrust treble-damage action against Olson and a codefendant, Oakdell Egg Farms. The producers alleged that defendants had conspired to depress the price of eggs in violation of sections 1 and 2 of the Sherman Act.[3] The jury

[3] *Cackling Acres, Inc. v. Olson Farms, Inc.* (D.Utah, Civ. No. C-296-71).

returned a verdict against Olson, later affirmed on appeal by the Court of Appeals for the Tenth Circuit (*Cackling Acres, Inc. v. Olson Farms, Inc.*, 541 F.2d 242 (10 Cir. 1976)). Safeway was not a party to the *Cackling Acres* case, it did not negotiate any pre-complaint or other settlement with the plaintiffs, and the jury verdict in *Cackling Acres* did *not* find that Safeway had violated the antitrust laws.[4]

The jury in the original antitrust action found that Olson had intentionally violated the antitrust laws. The trial court had instructed the jury that it could find Olson liable *only* if it determined that Olson had intentionally conspired to fix prices. The court instructed that "acceptance [of an agreement to restrain trade] must be conscious and intentional,"[5] and that "it must be shown that * * * the members [of the conspiracy] came to a mutual understanding to accomplish a common and unlawful plan."[6] As to the claim of conspiracy to monopolize, the court instructed that the *Cackling Acres* plaintiffs were required to prove that Olson had conspired "with the specific intent * * * to acquire or exercise monopoly power."[7]

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[4]In the subsequent contribution case, Olson's counsel admitted that "[w]e don't know whether they [the alleged contribution defendants, including Safeway] particularly were found to be conspirators" (R.T., June 6, 1975, p. 24). Just one month later a Federal grand jury indicted Olson and other egg dealers on charges of conspiracy to violate the antitrust laws. Once again Safeway was not named. Olson thereafter entered a plea of nolo contendere (CCH Trade Reg.Rep., U.S. Antitrust Cases 1970-1979, pp. 53,619-53,620).

[5]*Cackling Acres, Inc. v. Olson Farms, Inc.*, R.T., pp. 7366-7367.

[6]Ibid.

[7]Id., p. 7379; see also pp. 7383, 7387-7388.

After judgment was entered against it in the *Cackling Acres* case Olson commenced an independent action in the District of Utah against Safeway and others who had not been defendants in the initial antitrust action.[8] Olson asserted that it had a right of contribution or total indemnity against Safeway and the others.[9] Olson's claim for contribution was alleged to "arise under" the Federal antitrust laws, and was based on its contention that Safeway was "claimed" to be a conspirator with Olson in the underlying *Cackling Acres* case.

The district court dismissed Olson's action for contribution and indemnity, and the court of appeals affirmed.[10] Rehearing *en banc* was granted and the cases have been submitted on rehearing.

If this Court were to create a new right of antitrust contribution which could be asserted by intentional antitrust violators against third parties, as in the first *Olson* case, a whole new category of complex litigation—one that has not been authorized by Congress and would not otherwise exist—would be thrust on the Federal courts.

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[8]D. Utah, Civ. No. C-75-104.

[9]Olson brought its claim for contribution notwithstanding that over four-fifths of the damages for which Olson seeks contribution were assessed by the *Cackling Acres* jury under the section 2 conspiracy-to-monopolize count (*Cackling Acres, Inc. v. Olson Farms,* 1150-1153). Most of the contribution defendants were not even alleged to have been involved in that violation (*Cackling Acres, Inc. v. Olson Farms, Inc.*, R.T. p. 7378).

[10]*Olson Farms, Inc. v. Safeway Stores, Inc.*, 1979-2 CCH Trade Cases ¶ 62,995 (10 Cir. 1979).

The first *Olson* case illustrates the problem: Safeway was not a party to and did not participate in the original antitrust action. As a matter of due process of law it was therefore not bound by the judgment against Olson. Thus, before there could be any judgment of contribution against Safeway, a complete retrial of the original *Cackling Acres* antitrust case would be necessary.

At the retrial Olson, an adjudicated intentional antitrust violator, would step into the shoes of plaintiff. This would occur on hopelessly stale evidence almost fifteen years after the commencement of Olson's unlawful activities.

Even putting aside the subversion of the statute of limitations entailed in such a procedure, to permit unsuccessful antitrust defendants to assume the role of plaintiffs and retry their cases against new defendants not named in the original action (who, if they were unsuccessful, could sue still others for contribution in an endless chain) would produce an incalculable and unacceptable increase in the already substantial burden of antitrust litigation in the Federal courts.

2. *Cackling Acres, Inc., et al. v. Olson Farms, et al.* (D.Utah, Civ. No. C-75-472).

In November 1975, the egg producer plaintiffs in the original *Cackling Acres* antitrust case filed a "follow-on" treble-damage action alleging continuation of the initial conspiracy and seeking additional damages from Olson.[11] The complaint in this follow-on action again did not name Safeway as a defendant.

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[11] *Cackling Acres, Inc., et al. v. Olson Farms, Inc., et al.* (D. Utah, Civ. No. C-75-472).

This time Olson did not wait for judgment against it before seeking contribution. Instead, it filed cross-claims against the other defendants and a third-party complaint against Safeway. In its third-party complaint, Olson asked for contribution or total indemnity in the event Olson was ultimately found liable to the antitrust plaintiffs.

The district court again refused to create a right to antitrust contribution and dismissed Olson's cross-claims and third-party complaint. Olson then *settled* the follow-on action with the antitrust plaintiffs, with the result that the action against Olson was dismissed with prejudice and Olson avoided the ultimate determination of liability that had been contemplated in its cross-claims and third-party complaint. Nevertheless, Olson maintained before the Tenth Circuit that it was entitled to contribution from Safeway toward the Olson settlement, notwithstanding that the follow-on antitrust action against Olson had been dismissed in its entirety.

Olson's second contribution claim illustrates that a new Federal right of contribution would raise very substantial issues in the settlement context, in addition to those presented in the case now before this Court, including whether a settling antitrust violator may obtain contribution to offset its settlement.

A number of state statutes do not permit any contribution unless a joint judgment has been entered against the alleged tortfeasors (see generally Prosser, Torts (4th Ed. 1971) pp. 308-309; *Sabre Shipping Corporation v. American President Lines*, 298 F.Supp. 1339, 1343, n. 1 (S.D.N.Y. 1969)). In those jurisdictions which do, by statute, permit contribution in favor of a settling defendant in

negligence cases (there is no corresponding recognition of contribution in favor of intentional wrongdoers such as Olson), it is accepted that the settling defendant must step into plaintiff's shoes and *prove* with competent evidence both (i) that the settling defendant was in fact liable to the plaintiff, and (ii) that the asserted contribution defendants were jointly liable with it. As Prosser points out, in negligence cases "a compromiser must sustain the burden of proof * * * as to his own liability to the original plaintiff" and "[t]he contribution defendant must be a tortfeasor, and originally liable to the plaintiff" (Prosser, Torts, supra, p. 309; see *W. D. Rubright Co. v. International Harvester Co.,* 358 F.Supp. 1388, 1392 (W.D.Pa. 1973)).

Thus, to permit a right of contribution where no judgment of liability has ever been rendered and where the underlying antitrust action has been dismissed by the only antitrust plaintiffs that Congress has given standing to sue, would require the settling antitrust defendant to prosecute a full trial of the very antitrust action which the proper plaintiffs had earlier dismissed. Further, the district court would be required to determine whether the settlement released the alleged contribution defendants from liability to the plaintiffs, for if a settlement does not have that effect it is generally accepted that there can be no right of contribution.[12] Whether a release had

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[12]See, e.g., Uniform Contribution Among Tortfeasors Act (1955 Rev.) § 1(d); 1 Harper & James, Law of Torts (1956) § 10.2, p. 719; *Allbright Bros., Contractors v. Hull-Dobbs Co.,* 209 F.2d 103 (6 Cir. 1953) (Arkansas statute); *Brenham v. Southern Pacific Company,* 328 F.Supp. 119 (W.D.La. 1971) (Louisiana statute), affirmed 469 F.2d 1095 (5 Cir. 1972), certiorari denied 409 U.S. 1061 (1972).

that effect would be a matter of Federal law and would require an inquiry into the intent of the parties (*Zenith Radio Corp. v. Hazeltine Research,* 401 U.S. 321, 342-347 (1971)). Finally, Olson, to obtain contribution, would be required to establish after the fact that the amount of its settlement was "reasonable" (Prosser, Torts, supra, p. 309).

Obviously, if a right of contribution were recognized either in an independent action or in the circumstances of the *Cackling Acres* "follow-on" action, an enormous additional burden beyond that authorized or contemplated by section 4 of the Clayton Act would be imposed on litigants and the Federal courts.

CONCLUSION

For the reasons stated, this Court should decline to create a new right of contribution under the Federal antitrust laws.

Respectfully submitted,

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No. 79-1144

In the Supreme Court of the United States

OCTOBER TERM, 1980

TEXAS INDUSTRIES, INC., PETITIONER

v.

RADCLIFF MATERIALS, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

QUESTION PRESENTED

Whether a right to contribution among co-conspirators should be implied under the antitrust laws.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Introduction and summary of argument	1
Argument:	
The federal antitrust laws do not provide a right to contribution	3
A. The language and history of the Sherman and Clayton Acts show that Congress did not intend to permit contribution among persons who violate the antitrust laws	4
1. Statutory language	4
2. Legislative history	5
3. Recent antitrust legislation	7
B. Contribution is not necessary to effectuate any purpose of the antitrust laws, and such a remedy would undermine efficient antitrust enforcement	10
C. Courts should not create implied contribution rights to remedy perceived unfairness resulting from application of federal statutes	19
D. If a right to contribution is recognized in antitrust cases, it should not be available to intentional antitrust violators and should not be assertable against settling defendants	25
Conclusion	28

TABLE OF AUTHORITIES

Cases:

Alabama v. *Blue Bird Body Co.*, No. 75-23-N (M.D. Ala. 1979), appeal pending, No. 79-2667 (5th Cir.)	19
Allen v. *State Board of Elections*, 393 U.S. 544	13

PREVIOUS PAGE WAS BLANK

Cases—Continued Page

Ampicillin Antitrust Litigation, In re, 82 F.R.D. 647 19
Apex Hosiery Co. v. *Leader*, 310 U.S. 469 6
Beef Industry Antitrust Litigation, In re, 607 F.2d 167 19
Betts v. *Gibbins*, 111 Eng. Rep. 22 6
Brunswick Corp. v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 ..... 5, 10
Cannon v. *University of Chicago*, 441 U.S. 677..... 5, 13
Chicago City v. *Robbins*, 67 U.S. 418 ..... 6, 7
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Cort v. *Ash*, 422 U.S. 66 19
Deposit Guaranty National Bank v. *Roper*, 445 U.S. 326 15
Edmonds v. *Compagnie Generale Transatlantique*, 443 U.S. 256 ..... 3, 9-10
Eisen v. *Carlisle & Jacquelin*, 417 U.S. 156 24
El Camino Glass v. *Sunglo Glass Co.*, [1977-1] Trade Cas. (CCH) ¶ 61,533 ..... 11, 19
Fine Paper Antitrust Litigation, In re, No. MDL 323 (E.D. Pa. Aug. 3, 1979) 19, 24
First National Bank of Arizona v. *Cities Service Co.*, 391 U.S. 253 24
Fitzgerald v. *United States Lines Co.*, 374 U.S. 16.. 3
Goldlawr, Inc. v. *Shubert*, 276 F.2d 614 7-8
Gooding v. *United States*, 416 U.S. 430 7
Halcyon Lines v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282 .....4, 6, 7, 10, 21
Havoco of America v. *Shell Oil Co.*, No. 79-1261 (7th Cir. July 10, 1980) 24
Hedges Enterprises v. *Continental Group, Inc.*, [1979-1] Trade Cas. (CCH) ¶ 62,717 ..... 19, 27
Illinois Brick Co. v. *Illinois*, 431 U.S. 720 .....15, 18, 23
J. I. Case Co. v. *Borak*, 377 U.S. 426 13
Lawlor v. *National Screen Service Corp.*, 349 U.S. 322 5

Cases—Continued Page

Merryweather v. *Nixan*, 101 Eng. Rep. 1337 6
National Railroad Passenger Corp. v. *National Ass'n of Railroad Passengers*, 414 U.S. 453..... 4
National Society of Professional Engineers v. *United States*, 435 U.S. 679 6
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Owen v. *City of Independence*, 445 U.S. 622 7
Perma Life Mufflers, Inc. v. *International Parts Corp.*, 392 U.S. 134 ..... 5, 22
Pfizer, Inc. v. *Government of India*, 434 U.S. 308.. 5, 10
Piper v. *Chris-Craft Industries, Inc.*, 430 U.S. 1.... 5, 10, 13, 24
Poller v. *CBS, Inc.*, 368 U.S. 464 24
Professional Beauty Supply, Inc. v. *National Beauty Supply, Inc.*, 594 F.2d 1179 .....11, 17, 18, 19, 21, 27
Reiter v. *Sonotone Corp.*, 442 U.S. 330 ..... 1, 15
Sabre Shipping Corp. v. *American President Lines, Ltd.*, 298 F. Supp. 1339 .....8, 11, 19, 26, 27
St. Paul Fire & Marine Insurance Co. v. *Barry*, 438 U.S. 531 7
Santa Clara Pueblo v. *Martinez*, 436 U.S. 49 6
Sola Electric Co. v. *Jefferson Electric Co.*, 317 U.S. 173 21
Solomon v. *Houston Corrugated Box Co.*, 526 F.2d 389 5
Southern Pacific Co. v. *Jensen*, 244 U.S. 205 20
Standard Oil Co. v. *United States*, 221 U.S. 1 6
TVA v. *Hill*, 437 U.S. 153 20
Touche Ross & Co. v. *Redington*, 442 U.S. 560..... 4, 6, 10, 20
Transamerica Mortgage Advisors, Inc. v. *Lewis*, 444 U.S. 11 4
Union Stock Yards Co. v. *Chicago, Burlington & Quincy R.R.*, 196 U.S. 217 ..... 6, 7
United States v. *Gilman*, 347 U.S. 507.....4, 6, 10, 20
United States v. *Kubrick*, 444 U.S. 111 7
United States v. *Reliable Transfer Co.*, 421 U.S. 397 3
United States v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 27

Cases—Continued Page

United States v. *Standard Oil Co.*, 316 F.2d 884.... 22
United States v. *Topco Associates*, 405 U.S. 596.... 10
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Westvaco Corp., et al. v. *Adams Extract Company*, cert. dismissed, No. 79-972 (Oct. 20, 1980) 27
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Antitrust Improvements Act of 1976, Pub. L. No. 94-435, Title III, Section 4C, 90 Stat. 1394-1395 7
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Antitrust Procedures and Penalty Act of 1974, Pub. L. No. 93-528, Section 3, 88 Stat. 1706..... 7
Clayton Act, 15 U.S.C. 12 *et seq.* 4

15 U.S.C. 15 ..... 1, 3, 4, 5
15 U.S.C. 15a 1, 4
15 U.S.C. 15c 4, 13, 15
15 U.S.C. 15d 4, 13, 15
15 U.S.C. 15e 4, 13, 15
15 U.S.C. 15f 4, 13, 15
15 U.S.C. 15h 13, 15
15 U.S.C. 16 4

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Statutes and rules—Continued

Page

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15 U.S.C. 1 ..... 1, 4, 13, 21
15 U.S.C. 2 13
15 U.S.C. 3 4
15 U.S.C. 4 4
15 U.S.C. 6 4
15 U.S.C. 8 4
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15 U.S.C. 11 4

15 U.S.C. 1640(a)(2)(B) 15
Fed. R. Civ. P.:

Rule 23 ..... 13, 15, 24
Rule 23(e) 24

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Miscellaneous—Continued

Page

James, *Contribution Among Joint Tortfeasors: A Pragmatic Criticism*, 54 Harv. L. Rev. 1156 (1941) 12

Note, *A Case Against Contribution in Antitrust*, 58 Tex. L. Rev. 961 (1980) 7, 12, 13

Note, *Contribution in Private Antitrust Actions*, 93 Harv. L. Rev. 1540 (1980) 12

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Restatement (Second) of the Law of Torts (1977) 22

Rose, *Contribution in Antitrust: Some Policy Considerations*, 48 Antitrust L. J. 1605 (1980) 12

S. 390, 96th Cong., 1st Sess. (1979) 8

S. 1468, 96th Cong., 1st Sess. (1979) 8

S. Rep. No. 94-803, 94th Cong., 2d Sess. (1976) 8

S. Rep. No. 96-238, 96th Cong., 1st Sess. (1979) .. 19

S. Rep. No. 96-428, 96th Cong., 1st Sess. (1979) .. 8, 9, 11, 14, 23

12 U.L.A. Civil Proc. and Rem. Laws (1975) 22, 27

INTEREST OF THE UNITED STATES

The United States, which has the primary responsibility for enforcing the antitrust laws, has a substantial interest in ensuring the continuing efficacy and deterrent effect of private actions under Section 4 of the Clayton Act, 15 U.S.C. 15. See, *e.g.*, *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 344 (1979). Moreover, because the creation of a right to contribution may deter settlements and burden already complex litigation, the United States has a direct interest in this case as a potential plaintiff under Section 4A of the Clayton Act, 15 U.S.C. 15a.

INTRODUCTION AND SUMMARY OF ARGUMENT

In this case, which involves a claim that petitioner and others conspired to fix the price of ready-mix concrete in violation of Section 1 of the Sherman Act, 15 U.S.C. 1,[1] the court of appeals held that there is no implied right to contribution among co-conspirators under the antitrust laws (Pet. App. A-1 to A-19).[2] The court reasoned that "[t]he chance that a participant [in a conspiracy to violate the antitrust laws] may be faced with a full judgment is more likely to discourage anticompetitive conduct than would ensuring that each participant pays only some fair share" (*id.* at A-7). The court further observed that permitting antitrust defendants to seek contribution might well render such cases unmanageable (*id.* at A-17 to A-18). For these reasons and the reasons stated more fully below, we submit that the decision of the court of appeals, which is consistent with the overwhelming weight of authority, is correct.

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[1] Petitioner has previously pleaded *nolo contendere* to an indictment charging a criminal violation of Section 1. See Pet. App. A-2 n.2.

[2] Judge Morgan dissented (Pet. App. A-19 to A-24).

In contrast to other federal statutory schemes, the antitrust laws do not expressly provide for a right to contribution. Furthermore, the pertinent legislative history is barren of any indication that Congress sought to spread the impact of the treble damages remedy among antitrust conspirators or was otherwise concerned with the rights and remedies of those who violate the antitrust laws. That silence strongly indicates that Congress did not intend to permit co-conspirators to seek contribution from each other, because both the Sherman and Clayton Acts were enacted against a common law background prohibiting contribution among joint tortfeasors. More recently, Congress has considered proposals concerning whether and in what manner contribution should be permitted, but it has declined to date to permit such claims. Particularly since the question of contribution involves the weighing of many essentially legislative issues, this Court should not create an implied right to contribution under the antitrust laws.

At all events, implication of a right to contribution would not further the twin goals of compensation and deterrence that underlie the antitrust laws. To the contrary, permitting antitrust defendants to seek contribution might well undermine the deterrent effect of treble damages actions, especially in horizontal price fixing cases. In addition, the litigation that would be involved in determining relative rights to contribution would impose substantial burdens on the federal courts and could delay the compensation of antitrust plaintiffs. In short, recognition of a right to contribution would have a substantial adverse impact on the enforcement of the antitrust laws. In the absence of legislative guidance, debatable notions of fairness do not justify that result.

ARGUMENT

THE FEDERAL ANTITRUST LAWS DO NOT PROVIDE A RIGHT TO CONTRIBUTION

The issue in this case is whether an antitrust defendant who is subject to treble damages liability under Section 4 of the Clayton Act, 15 U.S.C. 15, may seek contribution from a co-conspirator. As we have discussed at length in our amici curiae brief in *Northwest Airlines, Inc.* v. *Transport Workers of America, AFL-CIO*, No. 79-1056, Oct. Term, 1980, at 6-15,[3] a right to contribution among joint tortfeasors was not recognized at common law, and, with the exception of admiralty jurisprudence,[4] the adoption of one form or another of contribution has generally been a legislative, not a judicial, phenomenon. Indeed, because contribution rules implicate competing policy considerations such as deterrence, fairness, and efficient enforcement, we submit that, at least in the absence of compelling reasons of statutory policy requiring them to do so, the federal courts should not create an implied right to contribution under a particular statutory scheme

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[3] We have served a copy of our brief in No. 79-1056 on the parties to this case.

[4] Accordingly, petitioner's reliance (Br. 12-13) on admiralty cases such as *Cooper Stevedoring Co.* v. *Fritz Kopke, Inc.*, 417 U.S. 106 (1974), is misplaced. The Court has repeatedly emphasized that "[a]dmiralty law is judge-made law to a great extent." *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U.S. 256, 259 (1979). See *e.g.*, *United States* v. *Reliable Transfer Co.*, 421 U.S. 397, 409 (1975); *Fitzgerald* v. *United States Lines Co.*, 374 U.S. 16, 20 (1963). Thus, "[e]ven though the common law of torts rejected a right of contribution among joint tortfeasors, the principle of division of damages in admiralty has, over the years, been liberally extended by this Court in directions deemed just and proper." *Cooper Stevedoring Co.* v. *Fritz Kopke, Inc.*, *supra*, 417 U.S. at 110. The question here, of course, is the extent of petitioner's rights under a statute. See Easterbrook, Landes & Posner, *Contribution Among Antitrust Defendants: A Legal and Economic Analysis*, 23 J. L. & Econ. 331, 336 (1980).

unless Congress has evidenced its intent to permit such claims. See, *e.g.*, *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 15 (1979); *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 568 (1979); *United States* v. *Gilman*, 347 U.S. 507, 511-513 (1954); *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282, 285-287 (1952). As we now demonstrate, the language and history of the Sherman and Clayton Acts and antitrust policy strongly militate against judicial recognition of a right to contribution.

A. The Language And History Of The Sherman And Clayton Acts Show That Congress Did Not Intend To Permit Contribution Among Persons Who Violate The Antitrust Laws

1. *Statutory Language.* Nothing in the language of either the Sherman Act, 15 U.S.C. 1 *et seq.*, or the Clayton Act, 15 U.S.C. 12 *et seq.*, suggests that there is a right to contribution under the antitrust laws. To the contrary, although Congress has enacted several provisions concerning rights and remedies in antitrust proceedings (see, *e.g.*, 15 U.S.C. 1, 3, 4, 6, 8, 9, 11, 15, 15a, 15c, 15d, 15e, 15f, 16), it has not expressly provided for the right to contribution claimed by petitioner. Particularly since Congress has elsewhere created an explicit right to contribution (see, *e.g.*, Section 11(f) of the Securities Act of 1933, 15 U.S.C. 77k(f) and Sections 9(e) and 18(b) of Securities Exchange Act of 1934, 15 U.S.C. 78i(e) and 78r(b)), this Court should be chary of reading an implied right to contribution into the antitrust laws. See, *e.g.*, *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, *supra*, 444 U.S. at 19-20; *Touche Ross & Co.* v. *Redington*, *supra*, 442 U.S. at 571-572; *National Railroad Passenger Corp.* v. *National Ass'n of Railroad Passengers*, 414 U.S. 453, 458 (1974).

Furthermore, the Sherman and Clayton Acts were neither enacted for the especial benefit of those who conspire to violate those statutes nor otherwise intended to

create rights on behalf of antitrust defendants. See, *e.g.*, *Cannon* v. *University of Chicago*, 441 U.S. 677, 689-694 & n.13, 707 n.41 (1979); *Piper* v. *Chris-Craft Industries, Inc.*, 430 U.S. 1, 37 (1977). The language of the antitrust laws in general and Section 4 of the Clayton Act in particular show that Congress was concerned with deterring anticompetitive activity and with facilitating the compensation of injured parties, not with allocating liability among co-conspirators. See, *e.g.*, *Pfizer, Inc.* v. *Government of India*, 434 U.S. 308, 314 (1978); *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 485-486 (1977). Under Section 4, each defendant may be fully liable for "threefold the damages * * * sustained" by "[a]ny person who [has been] injured * * * by reason of anything forbidden in the antitrust laws" regardless of the potential liability of any other co-conspirator. 15 U.S.C. 15. See *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134, 143-144 (1968) (White, J., concurring); *Lawlor* v. *National Screen Service Corp.*, 349 U.S. 322, 330 (1955); *Solomon* v. *Houston Corrugated Box Co.*, 526 F.2d 389, 392 n.4 (5th Cir. 1976). Thus, far from attempting to guarantee equity among violators, Congress determined severely to penalize those who engage in unlawful anticompetitive conduct. In these circumstances, there is no basis for implying a right to contribution under the antitrust laws. Cf. *Cannon* v. *University of Chicago, supra*, 441 U.S. at 692 n.13; *Piper* v. *Chris-Craft Industries, Inc., supra*, 430 U.S. at 37.

2. *Legislative history.* The history of the Sherman and Clayton Acts does not support petitioner's claims for contribution. We are unaware of any contemporaneous congressional statements directly addressing the issue of contribution. See also Pet. App. A-6; *Olson Farms, Inc.* v. *Safeway Stores, Inc.*, [1979-2] Trade Cas. (CCH) ¶ 62,995, at 79,701 (10th Cir. 1979). In light of the statutory language described above, however, such legislative silence reinforces the conclusion that no implied

right to contribution exists under the antitrust laws. See *Touche Ross & Co.* v. *Redington*, *supra*, 442 U.S. at 571; *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 64 (1978); *United States* v. *Gilman*, *supra*, 347 U.S. at 511-513.[5] Here, moreover, circumstantial historical evidence affirmatively suggests that Congress did not intend to permit one co-conspirator to seek contribution from another.

The legislative history accompanying the original Sherman Act indicates that the antitrust laws are to be construed against a background of well-settled common law principles and traditions. See *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 688 (1978); *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 497-500 (1940); *Standard Oil Co.* v. *United States*, 221 U.S. 1, 50-60 (1911); 21 Cong. Rec. 2456-2460 (1890) (remarks of Rep. Sherman). At the time that both the Sherman and Clayton Acts were passed, the common law unequivocally denied any right to contribution among joint tortfeasors. See, *e.g.*, *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, *supra*, 342 U.S. at 285; *Union Stock Yards Co.* v. *Chicago, Burlington & Quincy R.R.*, 196 U.S. 217, 224 (1905); *Washington Gas Light Co.* v. *Lansden*, 172 U.S. 534, 552 (1899); *Chicago City* v. *Robbins*, 67 U.S. 418, 424-425 (1862).[6] It is therefore

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[5] In *Gilman*, the Court unanimously declined to find an implied right to indemnity under the Federal Tort Claims Act on behalf of the United States. The Court explained (347 U.S. at 511-513; footnote omitted):

> [T]he claim now asserted, though the product of a law Congress passed, is a matter on which Congress has not taken a position. It presents questions of policy on which Congress has not spoken. The selection of that policy which is most advantageous to the whole involves a host of considerations that must be weighed and appraised. That function is more appropriately for those who write the laws, rather than for those who interpret them.

[6] The initial common law rule against contribution pertained solely to intentional tortfeasors. See, *e.g.*, *Merryweather* v. *Nixan*, 101 Eng. Rep. 1337 (K.B. 1799); *Betts* v. *Gibbons*, 111 Eng. Rep. 22 (K.B. 1834). In this country, the rule was applied in negligence

most unlikely that, in enacting the antitrust statutes, Congress intended to reverse this well settled common law doctrine without specifically so providing. *Olson Farms, Inc.* v. *Safeway Stores, Inc.*, *supra*, [1979-2] Trade Cas. (CCH) at 79,700. See, *e.g.*, *Owen* v. *City of Independence*, 445 U.S. 622, 637 (1980); *United States* v. *Kubrick*, 444 U.S. 111, 119-120 (1979); *St. Paul Fire & Marine Insurance Co.* v. *Barry*, 438 U.S. 531, 545-546 (1978); *Gooding* v. *United States*, 416 U.S. 430, 457-458 (1974).

3. *Recent antitrust legislation.* Subsequent legislative events also support the conclusion that implication of a right to contribution would conflict with the congressional intent in forming the antitrust laws. In 1974 and 1976, Congress generally reexamined the Sherman and Clayton Acts, but did not enact an express contribution provision such as that previously passed with regard to the securities laws. See page 4, *supra*. In fact, rather than acting to ameliorate the consequences of liability under the antitrust laws, Congress sought to enhance the potential liability of violators such as petitioner. See Antitrust Procedures and Penalty Act of 1974, Pub. L. No. 93-528, Section 3, 88 Stat. 1706, 1708 (increasing penalties under the Sherman Act); 120 Cong. Rec. 36338-36339 (1974) (remarks of Rep. Rodino); Antitrust Improvements Act of 1976, Pub. L. No. 94-435, Title III, Section 4C, 90 Stat. 1394-1395 (authorizing state attorneys general to sue for Sherman Act violations and to recover for monetary damages without proof of individualized injury in price fixing cases). And although the rule against contribution in antitrust cases was firmly entrenched in the federal courts at that time (see, *e.g.*, *Goldlawr, Inc.* v. *Shubert*, 276 F.2d

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cases as well. See, *e.g.*, *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, *supra*; *Union Stock Yards Co.* v. *Chicago, Burlington & Quincy R.R.*, *supra*; *Chicago City* v. *Robbins*, *supra*; *Easterbrook, Landes and Posner*, *supra*, 23 J. L. & Econ. at 332-334; Note, *A Case Against Contribution in Antitrust*, 58 Tex. L. Rev. 961-967 & n.48 (1980). We further note that petitioner has in any event engaged in intentional misconduct. See note 1, *supra*.

614, 616 (3d Cir. 1960); *Sabre Shipping Corp.* v. *American President Lines, Ltd.*, 298 F. Supp. 1339 (S.D.N.Y. 1969); Pet. App. A-3 to A-4 & n.4 (collecting cases)), Congress expressed its view that the existing treble damages remedy is both a necessary and satisfactory deterrent against antitrust violations. See S. Rep. No. 94-803, 94th Cong., 2d Sess. 45 (1976); H.R. Rep. No. 94-499, 94th Cong., 1st Sess. 13-15 (1975).

Indeed, the 96th Congress expressly considered the issue of contribution, but declined to enact legislation that would have allowed co-conspirators to seek contribution from each other. Thus, in 1979, a bill was introduced in the Senate providing for contribution based on "the damages attributable to each [co-conspirator's] sales or purchases." S. 1468, 96th Cong., 1st Sess. 1 (1979). See also S. 390, 96th Cong., 1st Sess. (1979) and H.R. 6792, 96th Cong., 2d Sess. (1980). Following hearings on the Senate bill (*Antitrust Equal Enforcement Act of 1979: Hearings on S. 1468 Before the Subcomm. on Antitrust, Monopoly and Business Rights of the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. (1979) (hereinafter "*Hearings on S. 1468*"), a sharply divided Senate Judiciary Committee recommended passage of the legislation. See. S. Rep. No. 96-428, 96th Cong., 1st Sess. (1979). The Senate Report observed that the majority of courts had denied a right to contribution under the antitrust laws because Congress had previously failed to indicate its views on this matter (*id.* at 1-2, 9-11) and that "the time has come to supply the appropriate congressional intent" (*id.* at 10). Nonetheless, neither the Senate nor the House bills were enacted.

Although such post-enactment legislative events are not dispositive, the debate regarding S. 1468 highlights the numerous different policy questions that are involved in the contribution controversy. Whether or not to permit contribution in any form raises difficult questions concerning fairness, deterrence, and efficient antitrust enforcement. See, *e.g.*, S. Rep. No. 96-428, *supra*, at 2-3,

13-20, 28-42; *Hearings on S. 1468, supra*, at 5-10, 17-31, 50-58, 62-63, 94-97; ABA, *Report of the Section of Antitrust Law With Legislative Recommendation* (Aug. 17, 1979) (divided recommendation in favor of contribution); pages 10-19, *infra*. Moreover, even assuming that contribution is ever desirable, there is wide disagreement as to the manner in which contribution should be calculated and the circumstances in which contribution should be permissible. For example, in his testimony before the Senate Judiciary Committee, Assistant Attorney General Shenefield explained that contribution might not be appropriate in cases involving criminal or per se unlawful conduct (*Hearings on S. 1468, supra*, at 7-8), and that contribution could be determined on a pro rata, comparative fault, market share, or other basis (*id.* at 8). Other substantial questions exist with regard to the procedures to be followed in determining contribution shares and the treatment to be afforded settling defendants (*id.* at 8-10).[7]

In the absence of any evidence of congressional intent to permit contribution under the Sherman and Clayton Acts, we submit that the Court should not disturb the longstanding rule against contribution in antitrust cases and, in the first instance, attempt to resolve the difficult and essentially legislative issues outlined briefly above. As the Court recently remarked in similar circumstances, "[b]y now changing what we have already established that Congress understood to be the law, and did not itself wish to modify, we might knock out of kilter this delicate balance. As our cases advise, we should stay our hand in these circumstances." *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U.S. 256,

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[7] The majority of the Senate Judiciary Committee recommended that, except as to settling defendants, contribution be permitted on the basis of market share in all antitrust cases. See S. Rep. No. 96-428, *supra*, at 4. The Minority Senate Report recommended against contribution in price fixing cases and endorsed a comparative fault method for allocating contribution shares. See *id.* at 28-29. See also pages 25-27, *infra*.

273 (1979) (footnote omitted). See, *e.g.*, *United States* v. *Topco Associates*, 405 U.S. 596, 611 (1972); *United States* v. *Gilman*, *supra*, 347 U.S. at 511-513. *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, *supra*, 342 U.S. at 285-286.

B. Contribution Is Not Necessary To Effectuate Any Purpose Of The Antitrust Laws, And Such A Remedy Would Undermine Efficient Antitrust Enforcement

Because petitioner is not among the statute's intended beneficiaries, and because there is no evidence in the legislative history that Congress meant to create a right of contribution in its favor, there may be no need to inquire whether recognition of such a remedy is necessary to achieve the purposes of the statute. See *Touche Ross & Co.* v. *Redington*, *supra*, 442 U.S. at 575-576; see also *id.* at 579-580 (Brennan, J., concurring). In any event, petitioner has wholly failed to demonstrate that an implied contribution remedy is "necessary to effectuate Congress' goals" under the antitrust laws. *Piper* v. *Chris-Craft Industries*, *supra*, 430 U.S. at 25-26, 41. Analysis of the practical effect of a contribution remedy demonstrates that such a remedy would not be helpful in achieving those goals. To the contrary, it would undermine effective statutory enforcement. This analysis fortifies the inference derived from statutory text and legislative history that Congress did not intend to authorize contribution claims among antitrust violators.

1. The decisions of this Court establish that Congress had a two-fold purpose in prescribing a private treble damage remedy under the antitrust laws—to compensate the victims of antitrust violations, and to deter potential offenders. See *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, *supra*, 429 U.S. at 485-486; *Pfizer, Inc.* v. *Government of India*, *supra*, 434 U.S. at 314. Granting a contribution remedy to antitrust defendants clearly would not promote the goal of compensating the victims of anti-

trust violations.[8] And petitioner has not sustained the burden of establishing that it would increase deterrence of antitrust violations.

At present, there is little empirical evidence bearing on the question whether contribution would weaken or strengthen deterrence, or leave it unaffected. Clashing assertions have been made by federal judges,[9] members of Congress,[10] participants in congressional hearings,[11]

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[8] To the contrary, as explained on pages 15-19, *infra*, recognition of a contribution remedy would undercut the ability of treble damage plaintiffs to obtain the compensation mandated by Congress.

[9] In the present case, the majority concluded that contribution would undermine deterrence (Pet. App. A-8), while Judge Morgan, dissenting and concurring, concluded that the effect of contribution on deterrence is inconclusive (*id.* at A-21 to A-22). In *Professional Beauty Supply, Inc.* v. *National Beauty Supply, Inc.*, 594 F.2d 1179, 1185 (8th Cir. 1979), the majority concluded that contribution may buttress deterrence, while Judge Hanson, in dissent, concluded that the effect on deterrence was inconclusive (*id.* at 1189). In *Olson Farms, Inc.* v. *Safeway Stores, Inc.*, [1979-2] Trade Cas. (CCH) ¶ 62,995, at 79,703 (10th Cir. 1979), the majority concluded that the effect of contribution on deterrence was speculative, while Judge Holloway, dissenting and concurring, stated that contribution could enhance deterrence (*id.* at 79,706-79,707). See also *Sabre Shipping Corp.* v. *American President Lines, Ltd.*, 298 F. Supp. 1339, 1346 (S.D.N.Y. 1979) (concluding that contribution would interfere with the deterrent purpose of the antitrust laws); *El Camino Glass* v. *Sunglo Glass Co.*, [1977-1] Trade Cas. (CCH) ¶ 61,533, at 72,112 (N.D. Cal. 1976) (concluding that contribution could undermine deterrence).

[10] Compare the views of the Senate Judiciary Committee on S. 1468, S. Rep. No. 96-428, 96th Cong., 1st Sess. 17-19 (1979) (concluding that contribution in price fixing cases may strengthen deterrence), with the supplemental views of Senators Kennedy and Metzenbaum, *id.* at 29, 32 (concluding that contribution and mandatory claims reduction could undercut deterrence).

[11] See *Hearings on S. 1468, supra*: statement of John Shenefield, Assistant Attorney General (*id.* at 27-28) (expressing the view that contribution may weaken the deterrent to intentional

and commentators.[12] To the extent that any consensus can be drawn from these disparate views, it is that neither economic theory nor other available tools of analysis provide an unambiguous answer.

There is, therefore, little basis at present for the assertion that antitrust violators, particularly substantial business firms, are encouraged to violate the law in the belief that, if the violation is discovered, they may escape liability while somebody else is forced to satisfy the damage claim.[13] To the extent that the traditional rule against contribution has any effect on potential intentional violators, the United States believes that it is more likely that the risk of bearing a disproportionately

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violations); statement of Lowell Sachnoff (*id.* at 50, 62), statement of Harold Kohn (*id.* at 92-93, 109), statement of Donald Polden (*id.* at 144-146), and letter of Mark Green (*id.* at 198-200) (all expressing the view that contribution will undermine the deterrent effect of the antitrust laws). Compare: statement of Robert Taylor (*id.* at 73-76), statement of Donald Kempf (*id.* at 66, 69-70), statement of Donald Hibner (*id.* at 118) (arguing that contribution may enhance deterrence).

[12] See Note, *Contribution in Private Antitrust Actions*, 93 Harv. L. Rev. 1540, 1544-1548 (1980) (concluding that contribution would not materially reduce deterrence); Easterbrook, Landes, and Posner, *supra*, 23 J. L. & Econ. at 349-350, 351-353, 365-368 (concluding that contribution would not increase and may well decrease deterrence); Rose, *Contribution in Antitrust: Some Policy Considerations*, 48 Antitrust L. J. 1605, 1614-1615 (1930) (concluding that the effects of contribution on deterrence are indeterminate); Note, *supra*, 58 Tex. L. Rev. at 969-979 (concluding that contribution would undermine deterrence).

[13] It is not likely that antitrust plaintiffs would ignore the largest potential defendants while looking to smaller defendants for their recoveries. A plaintiff ordinarily would be able to obtain the largest damage awards from the largest firms in an industry. Such firms therefore have little reason to anticipate that they would escape liability while smaller defendants are pursued for treble damages. See James, *Contribution Among Joint Tortfeasor: A Pragmatic Criticism*, 54 Harv. L. Rev. 1156, 1167 (1941).

large share of the damages liability encourages adherence to the law, particularly to the extent that corporate managers are "risk averse"—*i.e.*, are more fearful of a large penalty of less certain application than a small, more certain penalty shared with other violators.[14] A rule authorizing contribution might also reduce deterrence because it would remove the threat that a violator would be competitively disadvantaged by a disproportionately large damage award. To the extent that damages are apportioned among industry members, they become a common cost of doing business which, depending on the elasticity of consumer demand, may be recouped in whole or in part from each firm's customers in the form of increased prices. For these reasons, we think it most unlikely that a right to contribution would increase the effectiveness of treble damage actions as a deterrent to antitrust violations.[15]

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[14] See Easterbrook, Landes, and Posner, *supra*, 23 J. L. & Econ. at 351-353, 365; Note, *supra*, 58 Tex. L. Rev. at 973-977.

[15] Petitioner has the burden of demonstrating that the implied remedy it seeks is necessary to effectuate the congressional goal of deterrence. *Piper* v. *Chris-Craft Industries, Inc.*, *supra*, 430 U.S. at 25-26. In view of the treble damage penalty, the availability of class action procedures under Fed. R. Civ. P. 23, the parens patriae authority conferred on state attorneys general (see 15 U.S.C. 15c-h), and the recent increase in criminal sanctions under the antitrust laws (see 15 U.S.C. 1, 2), it would be difficult to maintain that contribution is in fact necessary to achieve the level of deterrence desired by Congress. Congress has adopted the combination of sanctions and remedies that it believes to be appropriate to achieve the statutory goal, and it did so in an environment in which antitrust contribution was unknown (see pages 6-8, *supra*). Moreover, in contrast to cases such as *Cannon* v. *University of Chicago*, *supra*, 441 U.S. at 706-709; *Allen* v. *State Board of Elections*, 393 U.S. 544, 577 n.23 (1969); and *J. I. Case Co.* v. *Borak*, 377 U.S. 426, 432 (1964), the federal authorities charged with enforcing the statute do not believe that an implied right of contribution is necessary to or helpful in achieving the goal of deterrence. As noted above, the United States is of the view that contribution would likely *decrease*, rather than increase, deterrence.

2. Some proponents of contribution have advanced the theory—a theory at odds with the view that contribution is needed to increase deterrence—that contribution is a salutary means of reducing what they view to be "over-deterrence" resulting from existing treble damage liability. Joint and several liability, it is argued, creates such enormous risks that businessmen may refrain from engaging in innovative activity even arguably at odds with the antitrust laws. By lowering the liability ceiling for antitrust violators, it is argued, a right to contribution would encourage bolder business activity near the boundary of lawfulness but short of any actual transgression.[16]

Even if the premise of that contention were accepted,[17] an implied right to contribution would not remedy the problem of uncertainty. It would merely lower the penalty for guessing wrong. Contribution would not make it any easier for businessmen to decide in advance whether a proposed course of action would violate the antitrust laws. Certainty under the antitrust laws must be pursued through progressive elaboration of legal standards by the courts and Congress, supplemented by announcement of enforcement policies by government officials. Moreover, the present case involves an alleged price fixing conspiracy, the participants in which already have pleaded *nolo contendere* in a criminal prosecution. In this context, there is little reason to modify prevail-

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[16] See, *e.g.*, S. Rep. No. 96-428, *supra*, at 18; *Hearings on S. 1468*, *supra*, at 73 (statement of Robert Taylor); *id.* at 163 (statement of Continental Group). As previously noted, we agree that a right of contribution would, in all likelihood, reduce the level of deterrence provided under the antitrust laws.

[17] The premise appears to be that innovative business practices often are subject to attack under the antitrust laws. While antitrust litigation occasionally involves what might be viewed as an innovative practice, it has been the United States' experience that the great majority of antitrust suits challenge familiar practices such as price fixing or stabilization, market and customer allocation, group boycotts, and exclusive dealing contracts.

ing legal doctrine to mitigate purported "over-deterrence" of arguably lawful conduct. Price fixing is a *per se* offense, not a "gray area" violation.

In addition, as we have noted above, it is indisputable that Congress prescribed the treble damages remedy in a legal environment in which contribution for analogous torts was unknown. Congress has since amended the antitrust laws with full awareness of the existence of class actions under the Federal Rules of Civil Procedure. And it has strengthened the deterrent impact of the treble damage action by creating parens patriae remedies for the attorneys general of each state (15 U.S.C. 15c-h). The level of deterrence created by these provisions is a reflection of Congress' decision to "encourag[e] vigorous private enforcement of the antitrust laws." *Illinois Brick Co.* v. *Illinois*, *supra*, 431 U.S. at 745.[18] In these circumstances, creation of a right to contribution to reduce deterrence in "gray area" cases would be unfaithful to the congressional purpose. While Congress is free to reduce deterrence by prescribing a right to contribution (see pages 3-4, 8-9, *supra*), the judiciary should not find such a right to be implied on the premise that existing legislation results in "over-deterrence."

3. We are also concerned that judicial recognition of a right to contribution may discourage injured parties from bringing antitrust actions and obstruct the efficient administration of the antitrust laws in the district courts.

If antitrust defendants were permitted to assert cross or third-party claims for contribution, some or all of the

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[18] This Court has admonished against modifying substantive antitrust law to rectify perceived problems arising from class actions. *Reiter* v. *Sonotone Corp.*, *supra*, 442 U.S. at 344-345; see also *Deposit Guaranty National Bank* v. *Roper*, 445 U.S. 326, 339 (1980) (noting that the remedy for class action abuses lies in a re-examination of Rule 23, not in distortion of other sound legal principles). When Congress has wished to restrict damage recoveries in class actions, it has done so expressly. See, *e.g.*, 15 U.S.C. 1640(a)(2)(B).

defendants would file such claims against each other. Each contribution complaint also could name previously unnamed third-party defendants, alleged to be involved in some facet of the alleged conspiracy.[19] Individuals also could be joined as defendants, adding substantially to the number of cross-claims and third-party claims.[20] Such contribution claims could be expected to spawn protracted disputes over whether antitrust defendants were involved in single or multiple conspiracies and the contours of the product and geographic markets involved, and each such claim could be expected to produce additional demands for and disputes over pretrial discovery. Moreover, companies not named as defendants might seek to intervene

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[19] In a major price fixing case, the number of cross and third party claims would be very large. For example, in *In re Corrugated Container Antitrust Litigation*, 84 F.R.D. 40 (S.D. Tex. 1979), aff'd, 606 F.2d 319 (5th Cir. 1979), cert. dismissed, No. 79-972 (Oct. 20, 1980), the complaint named 38 defendants. Each defendant could seek contribution from each of the others. Each could also seek to implead still other industry members and individuals responsible for pricing decisions. The named defendants in that proceeding estimated that there were as many as 1000 competing companies in the industry that could have been joined as third party defendants (C.A. Br. 17).

[20] The incentive to add far-reaching contribution claims would be substantial. See Cellini, *The Effect of Contribution on Litigation and Settlement: The Defendant's Viewpoint*, 48 Antitrust L. J. 1599, 1603-1604 (1980): "each such claim could mean a significant reduction in liability for a defendant faced with paying a treble damage award. After all, with contribution, the risk gets smaller as the conspiracy gets larger. * * * Should you assert a contribution claim against the entire industry? Well, if you view the situation solely from the standpoint of reducing your client's ultimate liability, either in a settlement package or for a judgment that may be rendered against your client, the answer would have to be yes. It seems to me you would be under an obligation to your client to fully exploit any connection you could find * * * between any other entity and the conspiracy your client has been charged with. That means many, many more companies are going to find themselves embroiled in antitrust litigation all over the country."

in cases involving charges of an industry-wide conspiracy. Such potential intervenors may conclude that their chances of defeating the plaintiff are better than their chances of defeating the original defendants, who are likely to know better than the plaintiff the participation and role of each of the conspirators.

It is by now a common-place observation that major antitrust litigation in the federal district courts is protracted and complex. The addition of contribution claims would undoubtedly make it more burdensome. The Eighth Circuit suggested in *Professional Beauty Supply, Inc., supra*, that undue burdens on plaintiffs could be mitigated by appropriate use of severance and other litigation management techniques (594 F.2d at 1184).[21] The Fifth Circuit in this case was not so sanguine; it feared that at least some adverse impact on litigation management would result (Pet. App. A-16 to A-18). In the absence of concrete experience, it is difficult to predict the extent to which the increased complexity of antitrust litigation would affect plaintiffs and the incentive to seek redress for antitrust injuries. At a minimum, however, it may be predicted that the adversary relationship between defendants asserting contribution claims against each other would deprive district courts and antitrust plaintiffs of litigation efficiencies previously engendered by cooperative defense efforts. The absence of coordinated defense efforts would prolong discovery and cause continuing problems both before and during trial.[22] Thus, even if certain

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[21] Judge Hanson's dissenting opinion disagreed: "It is not difficult to conceive of many circumstances in which the original plaintiff may simply be overwhelmed by embroilment in a lawsuit of a scope and size it never contemplated and is ill-equipped to handle. * * * Aware that litigation may spiral out of their control, it is foreseeable that some plaintiffs will decide to forego a legitimate cause of action." 594 F.2d at 1190.

[22] As Judge Singleton noted in *In re Corrugated Container Antitrust Litigation, supra*, 84 F.R.D. at 41, "joint defense efforts, with their savings in court, staff, and attorney time, would be hin-

contribution issues could be severed for post-trial resolution, it is predictable that the existence of cross and third-party claims would nonetheless complicate and delay antitrust actions to the detriment of injured persons seeking an expeditious remedy.

Finally, even if contribution claims could effectively be severed from the plaintiff's original action, that would only delay the ultimate reckoning for the district court. Following the completion of the original litigation, the district court would be required to adjudicate the claims of the conspirators against each other, after conducting discovery on the issues raised by the various cross, counter and third-party complaints. After determining which of the parties participated in the conspiracy, the court would be required to apportion damages on the basis of relative fault, volume of sales, or some other standard. Much of the proof in the severed contribution trial would duplicate the proof presented in the original trial, although—due to the potentially large number of defendants involved—the contribution trial could greatly exceed the scope and complexity of the original trial. In short, the resolution of contribution claims, whether in the original proceeding or in a separate deferred proceeding, "would greatly complicate and reduce the effectiveness of already protracted treble-damages proceedings" (*Illinois Brick Co.* v. *Illinois*, *supra*, 431 U.S. at 732). It should not lightly be presumed that Congress intended to "transform treble-damages actions into massive multiparty litigations" (*id.* at 740), with substantial new "costs to the judicial system and the efficient enforcement of the antitrust laws" (*id.* at 732; see also *id.* at 745-746).[23] In view of the present length and complexity of

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dered or deterred altogether." He added that contribution would "inhibit joint defense efforts to such an extent that this type of litigation would be virtually impossible to manage."

[23] Recent antitrust legislation manifests Congress' determination to "expedite and reduce the cost of antitrust litigation." See Antitrust Procedural Improvements Act of 1980, Pub. L. No. 96-349, 94

antitrust treble damage litigation, there is no reason to countenance such a danger, particularly in the absence of any convincing demonstration that contribution is necessary to serve the goals of the antitrust laws.[24]

C. Courts Should Not Create Implied Contribution Rights To Remedy Perceived Unfairness Resulting From Application Of Federal Statutes

In recognizing a contribution right in *Professional Beauty Supply, Inc.* v. *National Beauty Supply, Inc.*, *supra*, 594 F.2d at 1185-1186, the Eighth Circuit made no attempt to divine the intent of Congress by applying the analytical method prescribed in *Cort* v. *Ash*, 422 U.S. 66 (1975), and its progeny. Instead, it relied to a considerable extent on its own sense of "fairness" to justify creation of a federal common law right of contribution. "Contribution," it declared, is "an equitable doctrine based on the principle of justice between the parties" (594 F.2d at

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Stat. 1154 (preamble). In passing this statute, Congress decried the "extraordinary length and excessive cost of many antitrust cases," which "present serious obstacles to the effective enforcement of the antitrust laws." S. Rep. No. 96-238, 96th Cong., 1st Sess. 1 (1979). In simple terms, "[a]ntitrust cases take far too long to litigate." *Id.* at 3.

[24] No court, other than the Eighth Circuit in *Professional Beauty Supply, Inc.* v. *National Beauty Supply, Inc.*, *supra*, has permitted antitrust defendants to seek contribution from other violators. See *In re Corrugated Container Antitrust Litigation*, 84 F.R.D. 40 (S.D. Tex. 1979), aff'd, 606 F.2d 319 (5th Cir. 1979), cert. dismissed, No. 79-972 (Oct. 20, 1980); *In re Beef Industry Antitrust Litigation*, 607 F.2d 167 (5th Cir. 1979); *Olson Farms, Inc.* v. *Safeway Stores, Inc.*, [1979-2] Trade Cas. (CCH) ¶ 62,995 (10th Cir. 1979); *In re Fine Paper Antitrust Litigation*, No. MDL 323 (E.D. Pa. Aug. 3, 1979); *Alabama* v. *Blue Bird Body Co.*, No. 75-23-N (M.D. Ala. 1979), appeal pending, No. 79-2667 (5th Cir.); *Hedges Enterprises* v. *Continental Group, Inc.*, [1979-1] Trade Cas. (CCH) ¶ 62,717 (E.D. Pa. 1979); *In re Ampicillin Antitrust Litigation*, 82 F.R.D. 647 (D.D.C. 1979); *El Camino Glass* v. *Sunglo Glass Co.*, [1977-1] Trade Cas. (CCH) ¶ 61,533 (N.D. Cal. 1976); *Sabre Shipping Corp.* v. *American President Lines, Ltd.*, 298 F. Supp. 1339 (S.D.N.Y. 1969).

1185). That reasoning, we submit, misconceives the role of the federal judiciary in construing statutes enacted by Congress.

1. Federal courts are entrusted with expounding and applying federal statutes, but are not vested with a roving commission to improve upon legislation by enforcing judicially defined policies of fairness. See generally *TVA* v. *Hill*, 437 U.S. 153, 194-195 (1978). Thus, in *Touche Ross & Co* v. *Redington*, *supra*, 442 U.S. at 578-579, this Court held that defrauded investors had no right to seek redress for violations of Section 17(a) of the Securities Exchange Act of 1934, 15 U.S.C. 78q(a), even though they claimed that denial of a remedy "sanctions injustice" (442 U.S. at 579). The Court explained (*ibid.*, emphasis deleted; cite omitted):

> [E]ven if that were the case, the argument is made in the wrong forum, for we are not at liberty to legislate. If there is to be a federal damages remedy under these circumstances, Congress must provide it. "It is not for us to fill any hiatus Congress has left in this area."

The Court added that the "ultimate question is one of congressional intent, not one of whether this Court thinks that it can improve upon the statutory scheme that Congress enacted into law" (*id.* at 578). A contrary approach would permit federal courts to exercise legislative powers, since concepts of "fairness" are virtually standardless and without limit.

Allowance of a federal common law right to contribution for antitrust violations can scarcely be likened to "interstitial" law-making through "molecular" additions to a statute. See *Southern Pacific Co.* v. *Jensen*, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting). There is no gainsaying that implication of a contribution right for antitrust defendants would constitute judicial prescription of a wholly new policy—equity among antitrust violators—a policy that has no basis in the objectives of existing legislation. In view of the traditional rule against contribution under the antitrust laws, and the recent debate

in Congress surrounding contribution,[25] the issue of "fairness" should be left to the legislature. See *United States* v. *Gilman*, *supra*, 347 U.S. at 511-513; *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, *supra*, 342 U.S. 285.[26]

2. Implying a federal common law right of contribution in antitrust cases based on judicial perceptions of "fairness" is particularly hazardous in antitrust cases, since fairness arguments often cut both ways.

A substantial portion of treble damages actions involve intentional violations of the antitrust laws.[27] Traditionally, considerations of fairness have not been thought to require contribution in cases of intentional or reckless wrongdoing. To the contrary, fairness to the public demands that those who behave in intentional violation of

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[25] See pages 7-9, *supra*.

[26] Some lower courts have construed this Court's decision in *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U.S. 173 (1942), as a mandate for implying a contribution remedy to assure fairness among antitrust violators. See, *e.g.*, *Professional Beauty Supply, Inc.* v. *National Beauty Supply, Inc.*, *supra*, 594 F.2d at 1182 n.3. But *Sola* provides no such mandate. *Sola* held that a patent licensee could defend a contract action brought by a patent holder on the ground that the contract contained a price fixing provision in violation of Section 1 of the Sherman Act, 15 U.S.C. 1. Section 1 declares that every contract in restraint of trade is "illegal." The Court held that when a federal statute condemns an act as illegal, the nature of the legal consequences that attend that condemnation "are to be derived from the statute and the federal policy which it has adopted." 317 U.S. at 176. By permitting the licensee to defend on grounds of contract illegality, the Court simply gave force to Congress' express declaration. This Court did not suggest that district courts, in the interest of assuring "fairness," may fashion contribution remedies without support in the text, history, or purpose of the federal antitrust laws.

[27] An exhaustive study of private treble damage actions filed in the Northern District of Illinois disclosed that approximately 50 percent of those cases involved allegations of *per se* violations. See DuVal, *The Class Action as an Antitrust Enforcement Device: The Chicago Experience (I)*, 3 American Bar Foundation Research J., 1021, 1093 (Table 30) (1976). Other alleged violations may, of course, also involve intentional misconduct.

the law feel the full consequences of their misdeeds.[28] This reasoning applies to persons who engage in price fixing conspiracies. In conspiracy cases, the actions alleged are intentional: there is "no such thing as an 'unwitting conspirator'." *United States* v. *Standard Oil Co.*, 316 F.2d 884, 890 (7th Cir. 1963) (cite omitted). Moreover, quite apart from the public injury resulting from price fixing and the need to maximize deterrence in such cases, it is fair to require any participant in the conspiracy to make good the damages caused by the conspiracy since participation by each member often is essential to produce the injury. See *Perma Life Mufflers* v. *International Parts Corp.*, *supra*, 392 U.S. at 144 (White, J., concurring).[29]

Finally, "fairness" arguments advanced by proponents of contribution ignore the unfairness that their proposed procedures would impose on other litigants. Persons injured by antitrust violations could be exposed to additional delay and complication in vindicating their claims, as previously discussed. And litigants in other proceedings, who must rely on the limited resources of the already burdened judicial system, would be exposed to even greater delays and inconveniences while antitrust violators litigated among themselves their respective rights and liabilities. See Easterbrook, Landes and Posner, *supra*, 23 J. L. & Econ. 331, 339-344 (1980).

3. Concern also has been voiced that the traditional rule against contribution in antitrust cases permits "coercion" of innocent defendants, who enter into settlements to avoid increased exposure to damages after their co-

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[28] See W. Prosser, *Law of Torts* § 50 at 308 (1971); *Restatement (Second) of the Law of Torts* § 886A(3) and Comment 337, 342 (1977); *1955 Uniform Contribution Among Tortfeasor's Act* § 1(c) and Commissioners' Comment, 12 U.L.A. Civil Proc. and Rem. Laws 57, 63, 65 (1975); note 6, *supra*.

[29] If a competitor in a price fixing conspiracy insists on price competition, the conspiracy will fail or the uncooperative competitor will increase its market share to the detriment of the remaining conspirators. The conspiracy would not likely survive in such circumstances.

defendants settle with the plaintiff.[30] The factual basis for this assertion is subject to debate.[31] There is no reliable method for demonstrating the innocence of an alleged antitrust violator who foregoes the opportunity to establish its innocence in court.[32] Without denying the possibility that some innocent defendants have been compelled to enter into settlements that they would otherwise not make to avoid the mounting exposure to damages that results from settlements by their co-defendants, we suggest that there is simply inadequate proof that the problem occurs, or that if it does occur that it occurs frequently enough to justify imposition on litigants and the judicial system of the substantial costs that would result from an implied remedy for contribution. As this Court concluded in *Illinois Brick Co.* v. *Illinois*, *supra*, 431 U.S. at 746-747, considerations of litigation management and conservation of judicial resources must be weighed against the elusive goal of perfect fairness in particular cases.[33]

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[30] See S. Rep. No. 96-428, *supra*, at 13-17; *Hearings on S. 1468*, *supra*, at 64-68 (statement of Donald Kempf); *id.* at 118, 120-121 (statement of Donald Hibner).

[31] See S. Rep. No. 96-428, *supra*, at 37-38 (supplemental views of Senators Kennedy and Metzenbaum); *Hearings on S. 1468*, *supra*, at 95-97; 104-107, 188-191 (statement and letter of Harold Kohn refuting allegations of unfairness). See also DuVal, *The Class Action as An Antitrust Enforcement Device: The Chicago Experience (II)*, 4 American Bar Foundation Research Journal 1273, 1344, 1346 (1976) (finding little support for the contention that private treble damage class actions, brought in the Northern District of Illinois, coerced defendants into settling regardless of the merits of the plaintiff's claim).

[32] Any decision to settle requires an assessment by both the plaintiff and the defendant of a variety of factors, including the law and the facts, court costs, attorneys' fees, inconvenience, and the uncertainties inherent in litigation. See generally, R. Posner, *Economic Analysis of Law* 434-441 (1977).

[33] This Court has not been willing to modify sound legal principles merely to strengthen the litigation position of plaintiffs, who sometimes have contended that existing law precludes the assertion of meritorious claims. See, *e.g.*, *Coopers & Lybrand* v. *Livesay*, 437

In any event, remedies for potential "coercion" from meritless antitrust complaints "can more directly be achieved with other, less drastic means more closely tailored to the precise congressional goal" underlying the antitrust laws.[34] *Piper* v. *Chris-Craft Industries, Inc.*, *supra*, 430 U.S. at 40. While summary judgment should be granted sparingly in complex antitrust cases (*Poller* v. *CBS, Inc.*, 368 U.S. 464, 472-473 (1962)), defendants faced with unsubstantiated antitrust claims may obtain summary judgment and thereby avoid the uncertainties and pressures of trial. *First National Bank of Arizona* v. *Cities Service Co.*, 391 U.S. 253, 284-290 (1968); *Havoco of America* v. *Shell Oil Co.*, No. 79-1261 (7th Cir. July 10, 1980), slip op. 4-5. In addition, district courts may utilize Fed. R. Civ. P. 23 to prevent harassment of defendants by frivolous class action complaints. As this Court observed in *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 345 (1979), "[d]istrict courts must be especially alert to identify frivolous claims brought to extort nuisance settlements; they have broad power and discretion vested in them by [Rule 23 of the Federal Rules of Civil Procedure] with respect to matters involving the certification and management of potentially cumbersome or frivolous class actions." Moreover, even after a case has been certified as a class action, district courts retain authority under Rule 23(e) to supervise settlements and to prevent improper coercive behavior. *In re Fine Paper Antitrust Litigation*, No. MDL-323 (E.D. Pa. Aug. 3, 1979), slip op. 3.

U.S. 463, 473-477 (1978); *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 175-176 (1974). For similar reasons, unsubstantiated claims of coerced settlements from antitrust defendants provide no justification for creating, by judicial implication, a right to contribution involving the administrative difficulties we have discussed.

[34] Indeed, the availability of contribution against non-settlors, but not against settlors (see pages 25-27, *infra*) arguably might induce innocent persons the plaintiff would not otherwise have sued to seek settlements with the plaintiff in order to avoid contribution claims.

Finally, antitrust defendants are not powerless to protect themselves against large, disproportionate liabilities. By contracts, known as "sharing agreements," they may allocate the risk of liability among themselves. Such contractual arrangements typically bind the participating defendants to contribute proportionately to the payment of any judgment rendered against any of them.[35] Even in the absence of a sharing agreement, moreover, the amount paid by settling defendants is always subtracted from the plaintiff's recovery against the remaining defendants to prevent double recovery. *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U.S. 321, 348 (1971). This serves to reduce the economic exposure of those defendants who do not settle but instead elect to stand trial.

In sum, the problem of potential coercion in antitrust cases can be remedied in substantial part by currently available legal tools and contractual arrangements, without the complications that would result from implying contribution remedies among antitrust defendants.

D. If A Right To Contribution Is Recognized In Antitrust Cases, It Should Not Be Available To Intentional Antitrust Violators And Should Not Be Assertable Against Settling Defendants

If, contrary to the views expressed above, the Court concludes that Congress did intend to vest antitrust violators with a right to contribution in some cases, the Court should impute such an intent to Congress only in cases in which contribution would be least likely to undermine the statutory goal of deterrence or discourage settlements between plaintiffs and defendants. There is no reason to believe that, if Congress intended to create a right to contribution, it would have wished either to disrupt settlements negotiated in good faith or to under-

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[35] See ABA, *Report of the Section of Antitrust Law With Legislative Recommendation* (Aug. 17, 1979), "Minority Report on Contribution," at 10.

cut deterrence by providing contribution rights to intentional antitrust violators.

1. This Court has recognized that settlements in antitrust cases are in the public interest. *Zenith Radio Corp.* v. *Hazletine Research, Inc.*, 401 U.S. 321, 346-347 (1971); see also *Williams* v. *First National Bank of Pauls Valley*, 216 U.S. 582, 595 (1910). Settlements offer antitrust defendants the benefit of avoiding litigation costs and eliminating uncertainties concerning liability and damages. If contribution were permitted against settling defendants, those benefits would vanish and settlement incentives would be significantly reduced.[36] The resulting burden on the courts would compound the current problem of crowded dockets. And, if settlements were discouraged, the statutory goal of compensating injured persons on an expeditious basis would be undermined. Plaintiffs would be subjected to needless delay and expense by being forced to litigate cases that could have been settled prior to trial.[37] Accordingly, the United States believes that contribution should never be per-

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[36] See *Sabre Shipping Corp.* v. *American President Lines, supra*, 298 F. Supp. at 1346. "No defendant would settle * * * if he was to find himself back in the suit as a third party defendant." See also Easterbrook, Landes and Posner, *supra*, 23 J. L. & Econ., at 362. A disincentive to settlement also would be created by recognition of a "claims reduction" defense, which would reduce the liability of non-settling defendants by the portion of the total damages attributable to the settling defendants. A plaintiff would be reluctant to compromise a claim against one defendant (particularly a defendant with a large share of the market) if that would adversely affect his right to recover against co-conspirators and require him to participate in litigation concerning the settling defendant's proportionate share of the damages. See *Hearings on S. 1468, supra*, at 29 (statement of John Shenefield, Assistant Attorney General); *id.* at 95 (statement of Harold Kohn).

[37] A substantial percentage of large treble damage actions result in settlements. See *Hearings on S. 1468, supra*, at 94-97 (statement of Harold Kohn); DuVal, *The Class Action as an Antitrust Enforcement Device: The Chicago Experience (II)*, 4 American Bar Foundation Research Journal 1273, 1309-1327 (1976).

mitted against a defendant who has negotiated a settlement in good faith. See *Sabre Shipping Corp.* v. *American President Lines*, *supra*, 298 F. Supp. at 1346; *Hedges Enterprises* v. *Continental Group, Inc.*, *supra*, [1979-1] Trade Cas. (CCH) at 77,993; see also 1955 Uniform Contribution Among Tortfeasors Act § 4 and Commissioners' Comment, 12 U.L.A. Civ. P. and Rem. Laws 57, 98-100 (1975).[38]

2. Intentional violators of the antitrust laws, *i.e.*, those who act with a purpose unreasonably to restrain competition or who have reason to know that their conduct will have such an effect, pose the greatest danger to a competitive economy. They are most likely to be deterred from calculated violations by private treble damage liability, unmitigated by offsetting contribution rights.[39] In addition, no consideration of fairness militates in favor of contribution in such cases. See pages 21-22, *supra*.

In the present case, petitioner is alleged to have engaged in price fixing, an intentional violation. See *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 440 (1978); *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 213, 218-228 (1940). Contribution should not be available to diminish petitioner's exposure to damages for engaging in a price fixing conspiracy. Thus, even if contribution is available in other categories of antitrust cases, the court of appeals correctly concluded that it is unavailable here.

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[38] The petitioners in *Westvaco Corp., et al.* v. *Adams Extract Company*, No. 79-972, cert. dismissed, Oct. 20, 1980, contended that contribution should be available even against settling defendants. However, the case they relied on (*Professional Beauty Supply, Inc.* v. *National Beauty Supply, Inc.*, *supra*, 594 F.2d at 1184) recognized the need to "protect the rights of settling defendants."

[39] See *Hearings on S. 1468*, *supra*, at 27-28 (statement of John Shenefield), *id.* at 62 (statement of Lowell Sachnoff).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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No. 79-1144

IN THE

Supreme Court of the United

OCTOBER TERM, 1980

TEXAS INDUSTRIES, INC.,
Petitioner,

v.

RADCLIFF MATERIALS, INC.,
JIMCO, INC., and OKC DREDGING, INC.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF WESTVACO CORPORATION AS AMICUS CURIAE

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TABLE OF CONTENTS

PAGE

Table of Authorities iii

Interest of the Amicus Curiae 1

A. *In re Corrugated Container Antitrust Litigation*, M.D.L. 310 (S.D. Tex.) 2

1. Class Actions 2

2. Opt-out Actions 3

B. *Franklin Container Corp. v. International Paper Co.*, No. 77-3204 (E.D. Pa.) 3

Summary of Argument 4

Argument 4

I. Federal Courts Have the Power to Recognize Contribution in Antitrust Cases 4

II. Contribution and Claim Reduction Promote Fairness 7

A. This Court and Other Federal Courts Permit Contribution to Ensure Fairness 7

B. Contribution and Claim Reduction Will Promote Fairness By Eliminating Settlement Coercion and "Sweetheart" Deals 9

III. Contribution and Claim Reduction Promote Policies Underlying the Antitrust Laws 12

A. Contribution Deprives Violators of the Fruits of Their Illegal Conduct 12

1. "Scot Free" Violators 12

2. "Sweetheart" Deals 13

B. Contribution Promotes Deterrence 13

PAGE

IV. Contribution and Claim Reduction Will Not Complicate Antitrust Cases 15

A. Contribution Will Not Add New Issues to Antitrust Price-Fixing Cases 15

B. Contribution Will Not Present Procedural Manageability Problems 16

Conclusion 17

Appendix A-1

TABLE OF AUTHORITIES

Cases: PAGE

Alexander & Baldwin, Inc. v. Peat, Marwick, Mitchell & Co., 385 F. Supp. 230 (S.D.N.Y. 1974) 14

Arth Main Street Drugs v. Beer Distributors, Inc., 26 Fed. R. Serv. 2d 87 (N.D. Ind. 1978)..... 10

Board of County Commissioners v. United States, 308 U.S. 343 (1939)..... 4

Cackling Acres, Inc. v. Olson Farms, Inc., 541 F.2d 242 (10th Cir. 1976), *cert. denied*, 429 U.S. 1122 (1977) 12, 13

Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc., 454 F.2d 1292 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972)..... 11

City of Atlanta v. Chattanooga Foundry & Pipeworks, 127 F. 23 (6th Cir. 1903), *affirmed*, 203 U.S. 390 (1906) 6

Clearfield Trust Co. v. United States, 318 U.S. 363 (1943) 4

Cooper Stevedoring Co. v. Fritz Kopke, Inc., 417 U.S. 106 (1974) 5, 7, 8

Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978).... 10

In re Coordinated Pretrial Proceedings In Antibiotic Antitrust Actions, 410 F. Supp. 680 (D. Minn. 1975). 10

In re Corrugated Container Antitrust Litigation, 84 F.R.D. 40 (S.D. Tex. 1979)..... 10

In re Corrugated Container Antitrust Litigation, 1979-1 Trade Cases (CCH) ¶ 62,690 (S.D. Tex. 1979) 10

In re Corrugated Container Antitrust Litigation, 80 F.R.D. 244 (S.D. Tex.), *mandamus denied*, No. 78-3684 (5th Cir. 1978) 10

PAGE

Cort v. Ash, 422 U.S. 66 (1975) 6, 7

Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256 (1979)..... 8

In re Fine Paper Antitrust Litigation, 446 F. Supp. 759 (J.P.M.L. 1978)..... 9

In re Folding Carton Antitrust Litigation, M.D.L. 250 (N.D. Ill. 1979)..... 10

Funk v. United States, 290 U.S. 371 (1933) 6

Globus, Inc. v. Law Research Service, Inc., 318 F. Supp. 955 (S.D.N.Y. 1970), *affirmed*, 442 F.2d 1346 (2d Cir.), *cert. denied*, 404 U.S. 941 (1971)..... 14

Glus v. G.C. Murphy Co., 629 F.2d 248 (3d Cir.), *petition for cert. filed sub nom. Retail Wholesale & Department Store Union v. G.C. Murphy Co.*, 49 U.S.L.W. 3252 (Sept. 22, 1980) (No. 80-461) 5, 8

Gomes v. Brodhurst, 394 F.2d 465 (3d Cir. 1968)..... 8, 11

In re Government Auto Fleet Sales Antitrust Litigation, 328 F. Supp. 218 (J.P.M.L. 1971) 9

Grogg v. General Motors Corp., 72 F.R.D. 523 (S.D.N.Y. 1976) 5

In re Gypsum Cases, 386 F. Supp. 959 (N.D. Cal. 1974) 10

Heizer Corp. v. Ross, 601 F.2d 330 (7th Cir. 1979)....5, 8, 14

Hooley v. Red Carpet Corp. of America, 1975 Trade Cases (CCH) ¶ 60,285 (D. Ore. 1975), *appeal dismissed*, 549 F.2d 643 (9th Cir. 1977) 10

Illinois v. City of Milwaukee, 406 U.S. 91 (1972) 4, 5

Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977) 12

Jeffrey v. Southwestern Bell, 518 F.2d 1129 (5th Cir. 1975)..... 11

PAGE

Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 110 A.2d 24 (1954) 11

Kline v. Coldwell, Banker & Co., 508 F.2d 226 (9th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975) 10, 11

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PAGE

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Rule 14..... 16

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PAGE

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PAGE

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No. 79-1144

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

TEXAS INDUSTRIES, INC.,

Petitioner,

v.

RADCLIFF MATERIALS, INC.,
JIMCO, INC., and OKC DREDGING, INC.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF WESTVACO CORPORATION AS AMICUS CURIAE

Westvaco Corporation ("Westvaco") submits this Brief as *amicus curiae* with the consent of all parties hereto.[1] Westvaco urges this Court to recognize the right of contribution for defendants in antitrust cases and the corollary right of claim reduction.

INTEREST OF THE AMICUS CURIAE

Westvaco is a defendant in *In re Corrugated Container Antitrust Litigation*, M.D.L. 310 (S.D. Tex.) ("M.D.L. 310"), and in *Franklin Container Corp. v. International Paper Co.*, No. 77-3204 (E.D. Pa.) ("*Franklin Container*"). In these vari-

[1] All letters requesting and granting consent to the filing of this Brief have been filed with the Clerk of the Court.

ous actions, Westvaco has alleged (i) cross-claims for contribution for any damages attributable to other defendants which Westvaco might be required to pay, and (ii) affirmative defenses of "claim reduction" asserting that plaintiffs, by settling with any other defendants, have reduced their claims against Westvaco by the amount of damages fairly allocable to such defendants.

A. *In re Corrugated Container Antitrust Litigation*, M.D.L. 310 (S.D. Tex.)

M.D.L. 310 is the consolidation pursuant to 28 U.S.C. § 1407 of (i) forty-four class actions, and (ii) eighteen opt-out non-class actions.[2] All actions seek treble damages.

1. Class Actions

The class actions allege that thirty-seven corrugated container manufacturers named as defendants participated in a nationwide conspiracy to fix, raise, maintain and stabilize the prices of corrugated containers and sheets. Class plaintiffs have claimed their damages run into billions of dollars. Thirty-five defendants paid over $320 million to settle these claims.[3]

After more than three months of trial before a jury, Westvaco entered into a settlement with class plaintiffs on September 3, 1980 by paying $975,000, which was the approximate amount it would have cost Westvaco to complete the trial. By its terms, Westvaco's settlement agreement reduced plaintiffs' claims against any other defendants by the amount of damages which could be allocable to Westvaco, *i.e.*, claim reduction.[4]

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[2] These are cases where the plaintiffs opted out of the class. Westvaco is a defendant in 11 of these cases.

[3] *See* pages 9-11, *infra*.

[4] The Westvaco settlement agreement was the only one incorporating such a feature. The sole defendant which did not settle the class actions and which was subsequently found by the jury to have been a member of the alleged conspiracy now faces enormous damage exposure in the absence of contribution or claim reduction.

The settlement was preliminarily approved on September 16, 1980.[5]

2. Opt-out Actions

The eighteen opt-out actions also allege a conspiracy to fix the prices of corrugated containers and sheets. Discovery in these actions is scheduled for completion by May, 1981. Stipulations of dismissal have been filed on behalf of two of thirty-seven corrugated container manufacturers named as defendants in one or more of these actions. Westvaco has not settled any of the actions. In each of these actions, in the absence of contribution or claim reduction, an individual defendant may ultimately be responsible for damages caused by all of the defendants.

B. *Franklin Container Corp. v. International Paper Co.*, No. 77-3204 (E.D. Pa.)

Franklin Container, a purported class action, alleges that fourteen manufacturers of corrugated containers named as defendants conspired to depress the selling prices of corrugated containers while simultaneously maintaining the prices of linerboard. Six defendants, not including Westvaco, have settled for injunctive relief and damages. Without contribution or claim reduction, each individual defendant may be forced to bear the consequences not only of its own acts but those of all other defendants.

This Court's resolution of the case at bar in all likelihood will determine the legal sufficiency of Westvaco's contribution cross-claims in the M.D.L. 310 opt-out cases and in *Franklin Container.*

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[5] It was agreed that upon preliminary approval Westvaco would seek the dismissal of *Westvaco Corp. v. Adams Extract Co.*, *cert. granted*, 48 U.S.L.W. 3820 (June 16, 1980) (No. 79-972). Certiorari had been granted in that case on the question whether defendants in antitrust cases may assert rights of contribution. Westvaco's motion to dismiss was granted, *cert. dismissed*, 49 U.S.L.W. 3288 (Oct. 20, 1980).

Summary of Argument

This Court in the exercise of its federal common-law powers should recognize rights of contribution and claim reduction in antitrust cases to ensure fairness in the apportionment of damages among defendants.

Contribution and claim reduction will promote fairness by preventing antitrust violators from going "scot free" and eliminating "sweetheart" deals and settlement coercion. Contribution and claim reduction will encourage fair settlements based on the merits of the case.

Contribution promotes the disgorgement and deterrence objectives of the antitrust laws by ensuring that antitrust violators will be held accountable for their acts.

Contribution will not complicate antitrust price-fixing cases by adding new substantive issues or presenting procedural manageability problems. Furthermore, claim reduction will simplify the proof in antitrust cases.

ARGUMENT

I.

Federal Courts Have the Power to Recognize Contribution in Antitrust Cases

This Court may recognize rights of contribution in areas of federal concern by virtue of its power to fashion federal common-law rules to govern problems which "lie in the penumbra of express statutory mandates." *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 457 (1957).[6]

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[6] *See Illinois v. City of Milwaukee*, 406 U.S. 91, 103 (1972); *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 392-403 (1970); *Clearfield Trust Co. v. United States*, 318 U.S. 363, 367 (1943); *Royal Indem. Co. v. United States*, 313 U.S. 289, 296 (1941); *Board of County Comm'rs v. United States*, 308 U.S. 343, 349-52 (1939). *See generally* Friendly, *In Praise of Erie — And Of The New Federal Common Law*, 39 N.Y.U. L. Rev. 383 (1964).

Rules governing the availability of contribution are frequently judicial in origin. Thus, in the absence of statutory provisions, contribution rights have been judicially recognized in many federal cases, including admiralty,[7] securities,[8] employment discrimination,[9] and airline disaster cases.[10] Remedies provided by Congress "are not necessarily the only federal remedies available," and "there is a federal common law" in areas of special federal concern. *Illinois v. City of Milwaukee*, *supra*, 406 U.S. at 103.

Antitrust is clearly an area of special federal concern in which rights of contribution are cognizable as a matter of federal common law. The substantive liability of an antitrust defendant is determined by the provisions of the Sherman Act in conjunction with common-law principles, as this Court has repeatedly recognized:

> Congress, however, did not intend the text of the Sherman Act to delineate the full meaning of the statute or its application in concrete situations. The legislative history makes it perfectly clear that it expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition.

National Society of Professional Engineers v. United States, 435 U.S. 679, 688 (1978) (footnote omitted). As Judge Learned

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[7] *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S. 106, 111 (1974). *See also United States v. Reliable Transfer Co.*, 421 U.S. 397, 411 (1975).

[8] *Heizer Corp. v. Ross*, 601 F.2d 330, 332-33 (7th Cir. 1979); *Wassel v. Eglowsky*, 399 F. Supp. 1330, 1367 (D. Md. 1975), *affirmed*, 542 F.2d 1235 (4th Cir. 1976).

[9] *Glus v. G.C. Murphy Co.*, 629 F.2d 248, 252-54 (3d Cir.), *petition for cert. filed sub nom. Retail Wholesale & Dep't Store Union v. G.C. Murphy Co.*, 49 U.S.L.W. 3252 (Sept. 22, 1980) (No. 80-461); *Grogg v. General Motors Corp.*, 72 F.R.D. 523 (S.D.N.Y. 1976).

[10] *Kohr v. Allegheny Airlines, Inc.*, 504 F.2d 400 (7th Cir. 1974), *cert. denied*, 421 U.S. 978 (1975).

Hand stated, "Congress has incorporated into the Anti-Trust Acts the changing standards of the common law, and by so doing has delegated to the courts the duty of fixing the standard for each case." *United States v. Associated Press*, 52 F. Supp. 362, 370 (S.D.N.Y. 1943), *affirmed*, 326 U.S. 1 (1945). *See also Funk v. United States*, 290 U.S. 371, 382 (1933).

As a result, federal courts have routinely resolved issues ancillary to application of the Sherman and Clayton Acts through exercise of federal common-law powers. Thus, it was the federal courts that applied principles of joint and several liability to the antitrust laws by analogizing violators to joint tortfeasors. *City of Atlanta v. Chattanooga Foundry & Pipe-works*, 127 F. 23, 26 (6th Cir. 1903), *affirmed*, 203 U.S. 390 (1906). *See also Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 343-48 (1971) (effect of release in antitrust cases); *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 137-40 (1968) (availability of *in pari delicto* defense in antitrust cases).

In *Sola Electric Co. v. Jefferson Electric Co.*, 317 U.S. 173 (1942), this Court stated:

> When a federal statute condemns an act as unlawful, the extent and nature of the legal consequences of the condemnation, though left by the statute to judicial determination, are nevertheless federal questions, the answers to which are to be derived from the statute and the federal policy which it has adopted.

Id. at 176.

There is no indication in the legislative history of the Sherman Act or the Clayton Act that Congress considered the question of contribution.[11] Accordingly, for all of the foregoing reasons, judicial resolution of the issue is appropriate.

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[11] The Clayton Act expressly provides that persons who violate the Sherman Act shall be subject to civil liability. This Court is not being asked to imply a private cause of action within the meaning of *Cort v. Ash*, 422 U.S.

(footnote continued on following page)

II.

Contribution and Claim Reduction Promote Fairness

The old common-law rule against contribution unfairly forces a defendant to bear the consequences not only of his own acts but also those of his joint tortfeasors. As will be demonstrated below, the obvious inequity of the common-law rule has led federal courts to permit contribution in order to ensure fairness. Contribution and claim reduction in antitrust cases will ensure that antitrust violators do not escape "scot free," and will promote fairness by eliminating settlement coercion and "sweetheart" deals.

A. This Court and Other Federal Courts Permit Contribution to Ensure Fairness

In *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S. 106 (1974), this Court permitted contribution between joint tortfeasors in maritime noncollision cases to ensure fairness in the allocation of loss:

> [A] "more equal distribution of justice" can best be achieved by ameliorating the common-law rule against contribution which permits a plaintiff to force one of two wrongdoers to bear the entire loss, though the other may have been equally or more to blame. See *The Max Morris*, [137 U.S. 1 (1890)], at 14.

417 U.S. at 111.

A year later, this Court held that the elimination of potential unfairness required judicial adoption of a rule providing for

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66 (1975), or its progeny. In such cases, the Court has examined legislative history to determine whether subjecting a party to implied civil liability for violating a statutory standard of conduct is consistent with congressional intent. In contrast, the question here is simply whether contribution may be asserted against parties whom Congress has expressly intended to be subject to civil liability under the antitrust laws.

"just and equitable" allocation of damages. *United States v. Reliable Transfer Co.*, 421 U.S. 397, 411 (1975). By 1979 this Court observed in *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 271-72 n.30 (1979), that a tortfeasor "[n]ormally . . . may seek contribution from another concurrent tortfeasor. . . . Contribution remedies the unjust enrichment of the concurrent tortfeasor."

The principle of "equal distribution of justice," *Cooper Stevedoring, supra*, 417 U.S. at 111, through elimination of unfairness in the allocation of damages has been applied by federal courts in a steady movement toward recognition of contribution rights in numerous areas.[12]

In *Professional Beauty Supply, Inc. v. National Beauty Supply, Inc.*, 594 F.2d 1179 (8th Cir. 1979) ("*Professional Beauty Supply*"), the first appellate court ever to consider the contribution issue in an antitrust context held unequivocally that fairness requires the application of contribution. The court, in relying (*id.* at 1183) upon *Cooper Stevedoring*, recognized that contribution in treble-damage actions was necessary to ensure fundamental fairness and to prevent antitrust violators from going "scot free":

> The fact that one tortfeasor may be held liable for all the damages arising from the antitrust violation necessarily means that other joint tortfeasors may go "scot free." . . .
>
> There is an obvious lack of sense and justice in a rule which permits the entire burden of restitution of a loss for which two parties are responsible to be placed upon one

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[12] *See, e.g., Heizer Corp. v. Ross*, 601 F.2d 330, 331-33 (7th Cir. 1979) (contribution in federal securities fraud cases). *See also Glus v. G.C. Murphy Co., supra*, 629 F.2d 248 (contribution in discrimination cases); *Kohr v. Allegheny Airlines, Inc., supra*, 504 F.2d 400 (airline disaster cases); *Gomes v. Brodhurst*, 394 F.2d 465 (3d Cir. 1968) (Virgin Islands negligence cases); *Martello v. Hawley*, 300 F.2d 721 (D.C. Cir. 1962) (District of Columbia negligence cases).

alone because of the plaintiff's whim or spite, or his collusion with the other wrongdoer.

594 F.2d at 1185-86 (citation omitted).

B. Contribution and Claim Reduction Will Promote Fairness By Eliminating Settlement Coercion and "Sweetheart" Deals

The following examination of a common pattern in antitrust class actions involving multiple defendants demonstrates the abuses resulting from the absence of contribution and claim reduction.

First, there is the commencement of a grand jury investigation of an entire industry. Prior to the completion of such investigation but after it becomes public, numerous treble-damage class actions are brought against substantially all members of the industry whether or not they are under investigation.[13]

Second, the grand jury returns an indictment against a relatively small number of industry members, but the civil actions continue against all defendants whether indicted or not.[14]

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[13] *See, e.g., In re Fine Paper Antitrust Litigation*, 446 F. Supp. 759 (J.P.M.L. 1978); *In re Government Auto Fleet Sales Antitrust Litigation*, 328 F. Supp. 218 (J.P.M.L. 1971). *See generally* Rudnitsky & Blyskal, *Getting into Those Deep Pockets*, Forbes 59, 62 (Aug. 4, 1980).

[14] *Compare United States v. International Paper Co.*, Crim. No. H-78-11 (S.D. Tex. 1978) (nine corporate and nine individual felony indictees) *and United States v. Boise Cascade Corp.*, Crim. No. H-78-12 (S.D. Tex. 1978) (five corporate and 17 individual misdemeanor indictees) *with In re Corrugated Container Antitrust Litigation*, M.D.L. 310 (S.D. Tex.) (37 corporate defendants). All defendants that stood trial in the criminal cases were acquitted. Indeed, treble-damage actions sometimes continue even after the government concludes that there is no basis for criminal or civil charges. *See* Legal Times of Washington, Dec. 15, 1980 at 1, col. 1.

Third, prior to a ruling on class certification, plaintiffs enter into "ice-breaking" or "sweetheart" deals with some defendants, often those which are most culpable.[15]

Fourth, a large class is certified, and in the absence of contribution and claim reduction, all non-settling defendants are thereafter faced with enormous potential liability.[16]

Fifth, as a consequence, a settlement stampede ensues. With each successive settlement in the absence of contribution and claim reduction, the exposure of non-settling defendants increases because the damages allocable to settling defendants remain in the case. Accordingly, plaintiffs demand higher and higher settlement amounts having little or nothing to do with the merits of the claims.[17] As a result, multimillion dollar settlements have become commonplace.[18]

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[15] *See Manual for Complex Litigation*, § 1.46 (1978); Appendix A to this Brief ("App. A"). *See also In re Corrugated Container Antitrust Litigation*, 1979-1 Trade Cases (CCH) ¶ 62,690, at 77,882 (S.D. Tex. 1979).

[16] *See, e.g., In re Corrugated Container Antitrust Litigation*, 80 F.R.D. 244 (S.D. Tex.), *mandamus denied*, No. 78-3684 (5th Cir. 1978). *See also Kline v. Coldwell, Banker & Co.*, 508 F.2d 226, 234-35 (9th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975); *Arth Main St. Drugs v. Beer Distribs., Inc.*, 26 Fed. R. Serv. 2d 87 (N.D. Ind. 1978); *Hooley v. Red Carpet Corp. of America*, 1975 Trade Cases (CCH) ¶ 60,285, at 66,112 (D. Ore. 1975), *appeal dismissed*, 549 F.2d 643 (9th Cir. 1977). *Cf. Reiter v. Sonotone Corp.*, 442 U.S. 330, 345-46 (1979) (Rehnquist, J., concurring); *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978). *See generally* Rowe, *On Fostering Fights*, N.Y. Times, Aug. 6, 1980, at A-21.

[17] *See* App. A. *See also In re Corrugated Container Antitrust Litigation*, 84 F.R.D. 40, 41 (S.D. Tex. 1979). *See generally* Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits*, 71 Colum. L. Rev. 1, 9 (1971).

[18] *See, e.g., In re Folding Carton Antitrust Litigation*, M.D.L. 250 (N.D. Ill. 1979) ($218 million settlement from 24 defendants); *In re Coordinated Pretrial Proceedings In Antibiotic Antitrust Actions*, 410 F. Supp. 680 (D. Minn. 1975) ($180 million from five defendants); *In re Gypsum Cases*, 386 F. Supp. 959 (N.D. Cal. 1974) ($67 million from seven defendants).

Sixth, in addition, certain small defendants confident of their innocence are nevertheless frequently forced by economic pressures to submit to plaintiffs' blackmail demands to avoid being crushed.[19]

Recognition of rights of contribution and claim reduction will end this undisputed reign of terror in massive antitrust actions. Contribution coupled with claim reduction will permit each defendant to negotiate a fair settlement. *See Gomes v. Brodhurst*, 394 F.2d 465, 467 (3d Cir. 1968); *Judson v. Peoples Bank & Trust Co.*, 17 N.J. 67, 93, 110 A.2d 24, 36-37 (1954) (Brennan, J.), *quoting McKenna v. Austin*, 134 F.2d 659 (D.C. Cir. 1943). *See also United States v. Reliable Transfer Co.*, 421 U.S. 397, 408 (1975) ("a rule of fairness in court will produce fair out-of-court settlements").[20]

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[19] Green Bay Packaging Co., Inc. ("Green Bay"), one of the small defendants in M.D.L. 310, had resolved to vindicate its innocence at trial because it believed it had done nothing wrong. After other defendants settled, however, Green Bay, a family-owned business, was faced with the loss of its line of credit unless it resolved its contingent liability. To remain viable, Green Bay had no choice but to accept plaintiffs' demand for $5,557,500.00 (App. A). As George Kress, the founder and president of Green Bay, stated:

> The effect of this extortive settlement practice upon a small, family-owned and managed business is catastrophic. We were threatened with the loss of over 50 years of effort, and coerced into paying an exorbitant settlement rather than being afforded the privilege of ultimately proving our corporate innocence.

Senate Comm. on the Judiciary, Hearings on S.1468 Before the Subcomm. on Antitrust, Monopoly and Business Rights, The Antitrust Equal Enforcement Act of 1979, 96th Cong., 1st Sess. 45 (1979). *See also Mid-West Paper Products Co. v. Continental Group, Inc.*, 596 F.2d 573, 587 (3d Cir. 1979); *Jeffrey v. Southwestern Bell*, 518 F.2d 1129, 1131 (5th Cir. 1975); *Kline v. Coldwell, Banker & Co.*, 508 F.2d 226, 234 (9th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975); *Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc.*, 454 F.2d 1292, 1295 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972); *Reading Indus., Inc. v. Kennecott Copper Corp.*, 477 F. Supp. 1150, 1159-60 (S.D.N.Y. 1979); *Shapiro v. General Motors Corp.*, 472 F. Supp. 636, 659 (D. Md. 1979). *See generally* Janofsky, *The "Big Case": A "Big Burden" on Our Courts*, 66 A.B.A.J. 848, 849 (1980).

[20] *See generally* Polinsky & Shavell, *Contribution and Claim Reduction Among Antitrust Defendants: A Policy Analysis*, 33 Stan. L. Rev.__ (1981) (to be published), an earlier draft of which was prepared at Westvaco's

(footnote continued on following page)

III.

Contribution and Claim Reduction Promote Policies Underlying the Antitrust Laws

The treble-damage remedy of the Clayton Act advances three goals. First, it provides a means by which victims of antitrust violations may be compensated for their injuries. Second, it deprives violators of the antitrust laws of the fruits of their illegal conduct ("disgorgement"). Third, it serves to deter future violations ("deterrence"). *See Pfizer Inc. v. Government of India*, 434 U.S. 308, 314 (1978); *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 746 (1977).

Contribution does not affect the right of a plaintiff to be compensated because under joint and several liability a plaintiff may collect a judgment entirely from any defendant found to have violated the antitrust laws. Accordingly, courts considering whether contribution should be recognized have focused upon the disgorgement and deterrence objectives of the antitrust laws.

A. Contribution Deprives Violators of the Fruits of Their Illegal Conduct

In numerous situations, the absence of contribution permits antitrust violators to go "scot free" or to obtain "sweetheart" deals not commensurate with damages they may have caused.

1. "Scot Free" Violators

If a plaintiff for any reason whatsoever does not name all antitrust violators as defendants, such violators go "scot free" in the absence of contribution. For example, in *Cackling*

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instigation. *Compare* Note, *Contribution In Private Antitrust Actions*, 93 Harv. L. Rev. 1540, 1560-61 (1980), *and* Jacobson, *Contribution Among Antitrust Defendants: A Necessary Solution To A Recurring Problem*, 32 U. Fla. L. Rev. 217, 236-38 (1980) *with* Easterbrook, Landes & Posner, *Contribution Among Antitrust Defendants: A Legal and Economic Analysis*, 23 J.L. & Econ. 331,__ (1980) (forthcoming).

Acres, Inc. v. Olson Farms, Inc., 541 F.2d 242 (10th Cir. 1976), *cert. denied*, 429 U.S. 1122 (1977), plaintiffs elected not to sue certain large co-conspirators to avoid disrupting business relationships, and, as a consequence, a single defendant was held liable for the damages caused by all of the co-conspirators. *See* Petition for Rehearing at 4 n.2, *Olson Farms, Inc. v. Safeway Stores, Inc.*, 1979-2 Trade Cases (CCH) ¶ 62,995 (10th Cir.), *en banc rehearing granted and pending* (Dec. 27, 1979).[21]

2. "Sweetheart" Deals

The disgorgement objective of the treble-damage remedy may also be frustrated even if all participants in an allegedly illegal scheme are named as defendants. Plaintiffs may enter into "sweetheart" deals with selected defendants for reasons unrelated to the merits of the claims against such defendants.[22] In the absence of contribution and claim reduction, all damages allocable to a settling defendant remain in the case for purposes of damage calculation against non-settling defendants.[23]

B. Contribution Promotes Deterrence

Contribution promotes the deterrent policies of the antitrust laws by increasing the certainty that all violators will be forced to bear the consequences of their conduct.[24] The effect of no contribution on deterrence was well expressed in *Professional Beauty Supply, supra*, where the court stated:

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[21] *But see Professional Beauty Supply, supra*, 594 F.2d 1179.

[22] *See* Settlements by International Paper Co. and St. Regis Paper Co. (App. A). *See also* page 10 & note 15, *supra*.

[23] Claim reduction discourages sweetheart settlements by ensuring that settlements will be based on the merits and will fairly reflect the illegal gains, if any, located in the coffers of each settling defendant.

[24] *See* Corbett, *Apportionment of Damages and Contribution Among Coconspirators in Antitrust Treble Damage Actions*, 31 Fordham L. Rev. 111, 137 (1962); *Panel Discussion: Private Actions — The Purposes Sought and The Results Achieved*, 43 Antitrust L.J. 73, 104 (1974). *See also* Note, *Contribution In Private Antitrust Actions*, 93 Harv. L. Rev. 1540, 1544-45 (1980).

> This possibility of escaping all liability might cause many to be more willing, rather than less willing, to engage in wrongful activity. . . .
>
> To deny contribution would be to dilute the deterrent effect of the antitrust laws, since a participant in an antitrust violation could escape all responsibility for its wrongdoing.

Id. at 1185. For this reason, contribution is particularly effective in deterring intentional misconduct. *Id.* at 1186. *See Olson Farms, supra*, 1979-2 Trade Cases (CCH) ¶ 62,995, at 79,706-07 (Holloway, J., dissenting); Recent Developments, *Contribution Among Antitrust Defendants*, 33 Vand. L. Rev. 979, 983 (1980).[25]

Furthermore, middle level managers are often the persons whose activities lead to alleged antitrust violations, and their behavior is more affected by the possibility of detection and its impact upon their careers than by the magnitude of their employers' potential penalties:

> The deterrent effect of a determination that those managers violated the antitrust laws would not be tied to the magnitude of liability because firm sanctions against such managers depend primarily upon the fact of violation. Under such circumstances, allowing contribution would best deter antitrust violations, for it would increase the probability that the company will be held liable for those violations and hence increases the frequency of company sanctions against overzealous employees.

Contribution In Private Antitrust Actions, supra, 93 Harv. L.

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[25] *See also Heizer Corp. v. Ross*, 601 F.2d 330, 334 (7th Cir. 1979); *Alexander & Baldwin, Inc. v. Peat, Marwick, Mitchell & Co.*, 385 F. Supp. 230, 238-39 (S.D.N.Y. 1974); *Globus, Inc. v. Law Research Serv., Inc.*, 318 F. Supp. 955 (S.D.N.Y. 1970), *affirmed*, 442 F.2d 1346 (2d Cir.), *cert. denied*, 404 U.S. 941 (1971).

Rev. at 1546 (footnotes omitted). *See* Polinsky & Shavell, *Contribution and Claim Reduction Among Antitrust Defendants: A Policy Analysis*, *supra*, 33 Stan. L. Rev.__ (1981).[26]

Accordingly, contribution and claim reduction promote policies of the antitrust laws by ensuring that antitrust violators will be held accountable for their conduct.

IV.

Contribution and Claim Reduction Will Not Complicate Antitrust Cases

Recognition of rights of contribution and claim reduction for defendants in antitrust price-fixing cases will neither add substantive issues nor present manageability problems.

A. Contribution Will Not Add New Issues to Antitrust Price-Fixing Cases

Plaintiffs in a price-fixing case must prove violation, impact, and damages. *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 560 (1931). In order to recover damages in a price-fixing case, plaintiffs prove sales by participants in the alleged illegal activity and the amount of damages resulting therefrom. Because these issues determine the applica-

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[26] Major corporations have adopted antitrust compliance programs in which employees are instructed in antitrust principles and directed to conform their conduct to the law. Employees who violate antitrust compliance programs are subject to discipline. *See generally* J. Garrett, *Antitrust Compliance* (1978); *Panel Discussion: Varied Approaches to Antitrust Compliance*, 48 Antitrust L.J. 53 (1980). Furthermore, there are substantial criminal sanctions under the antitrust laws which apply to both individuals and corporations.

bility of contribution among defendants, an antitrust price-fixing case will not be complicated by contribution.[27]

Opponents of contribution argue that its availability should turn on whether or not a defendant is an intentional violator, and from this they argue that contribution would procedurally complicate antitrust cases by injecting the issue of intent into treble-damage cases. But a rule of contribution should be available, irrespective of intent, according to the same standard as is applied to determine liability to a plaintiff in the first instance. Any effort to distinguish between intentional and unintentional violators ignores the basic fairness requiring contribution.[28] *See* Note, *Contribution in Antitrust Treble Damage Actions*, 6 J. Corp. L. 141, 193-94 (1980).

B. Contribution Will Not Present Procedural Manageability Problems

The assertion of cross-claims in multi-defendant cases offers the advantage of consolidating the antitrust and contribution claims in a single proceeding. Fed. R. Civ. P. 13 permits a defendant to state a cross-claim "against a co-party arising out of the transaction or occurrence that is the subject matter . . . of the original action." Indeed, this rule permits the single adjudication of claims that at common law might otherwise have resulted in separate actions. *See Southern Construction Co. v. Pickard*, 371 U.S. 57, 60 (1962).

If contribution from a non-party is appropriate, Fed. R. Civ. P. 14 provides the mechanism for asserting third-party claims. In such instances the district court will have the discretion to have one trial or to order separate trials under Fed. R. Civ. P. 42(b) if it perceives a risk that the antitrust action will become too complicated.

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[27] Claim reduction would have the additional salutary effect of simplifying antitrust cases because a plaintiff need only prove the liability of non-settling defendants and does not have to prove damages attributable to settling defendants.

[28] *See* page 14 & note 25, *supra*.

In sum, the achievement of fairness in the allocation of damages through recognition of rights of contribution and claim reduction in antitrust cases presents no obstacles to the administration of justice. In any event, speculative savings of judicial resources do not warrant the injustices to antitrust defendants which otherwise occur.[29]

CONCLUSION

For the foregoing reasons, Westvaco requests this Court to reverse the decision of the Court of Appeals for the Fifth Circuit and to remand to the district court with instructions to permit the assertion of contribution and claim reduction.

Dated: December 16, 1980

Respectfully submitted,

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[29] As this Court noted in *United States v. Reliable Transfer, supra*, "[p]otential problems of proof in some cases hardly require adherence to an archaic and unfair rule in all cases." 421 U.S. at 407.

APPENDIX

Appendix A

IN RE CORRUGATED CONTAINER
ANTITRUST LITIGATION, M.D.L. 310

Settlements in Class Actions through January 1979

Settling Defendants (Listed by categories in approx. order of Settlement)	*The % of Defendants' Market*	*Approximate Dollar Amount per % point of defendant's market share*	*Amount Paid In Settlement*
FELONY INDICTEES			
1. International Paper	8.3	$1.00 million	$ 8,300,000
2. Champion International Hoerner Waldorf	5.36	$4.50 million	$24,120,000
3. Weyerhaeuser	7.83	$5.00 million	$39,150,000
4. Owens-Illinois	5.45	$6.00 million	$32,700,000
5. Olinkraft	1.225	$6.00 million	$ 7,350,000
6. Continental Group	4.22	$6.50 million	$27,430,000
MISDEMEANOR INDICTEES			
1. Boise Cascade	2.826	$3.50 million	$ 9,891,000
2. Container Corp. of America	8.56	$4.00 million	$34,240,000
3. Inland Container	7.29	$4.75 million	$34,627,500
4. St. Joe Paper	2.625	$4.75 million	$12,468,750
5. Stone Container	3.055	$4.75 million	$14,511,250
UNINDICTED			
1. St. Regis Paper	3.97	$ .43 million	$ 1,700,000
2. Union Camp	3.70	$2.00 million	$ 7,400,000
3. Diamond International	.50	$2.00 million	$ 1,000,000
4. Dura-Containers	.375	$2.00 million	$ 750,000
5. Chesapeake	1.26	$2.40 million	$ 3,024,000
6. Longview Fibre	2.58	$2.50 million	$ 6,450,000
7. Willamette Industries/ Western Kraft East/ Corco	4.18	$2.70 million	$11,286,000
8. Menasha	1.67	$2.75 million	$ 4,592,250
9. MacMillan Bloedel MacMillan Bloedel Containers	2.11	$4.00 million	$ 8,440,000
10. U.S. Corrugated-Fibre Box	.767	$4.00 million	$ 3,069,120
11. Green Bay Packaging	1.71	$3.25 million	$ 5,557,500

IN THE

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OCTOBER TERM, 1980

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Petitioner,

vs.

RADCLIFF MATERIALS, INC., et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF WEYERHAEUSER COMPANY AND WILLAMETTE INDUSTRIES, INC. AS AMICI CURIAE

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TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	iii
INTEREST OF AMICI CURIAE	1
SUMMARY OF ARGUMENT	3
ARGUMENT:	
I. *CORRUGATED* DEMONSTRATES THE UNFAIRNESS WHICH RESULTS FROM THE ABSENCE OF PROPORTIONATE LIABILITY	4
A. Without Proportionate Liability, *Corrugated* Defendants Were Coerced To Settle For Progressively Increased Amounts Because They Could Not Risk Sole Liability For The Enormous Alleged Damages	4
B. Innocent Defendants In *Corrugated* Were Forced To Forego Their Right To Trial	6
II. THIS COURT SHOULD ADOPT PROPORTIONATE LIABILITY IN ANTITRUST CASES, AS IT HAS IN OTHER CONTEXTS, BECAUSE IT IS FUNDAMENTALLY FAIR.	9
III. PROPORTIONATE LIABILITY SHOULD BE ACHIEVED THROUGH CARVE-OUT IN CASES IN WHICH SETTLEMENTS HAVE OCCURRED	12
IV. PROPORTIONATE LIABILITY IS PARTICULARLY APPROPRIATE IN ANTITRUST CASES BECAUSE IT PROMOTES THE DETERRENCE AND DISGORGEMENT POLICIES UNDERLYING THE ANTITRUST LAWS	15
A. Proportionate Liability Enhances Deterrence	15
B. Proportionate Liability Better Assures Disgorgement Of Any Illegal Gains	17

PAGE

C. Carve-Out, In Particular, Promotes Deterrence And Disgorgement By Discouraging "Sweetheart" Settlements 19

V. ACHIEVING PROPORTIONATE LIABILITY THROUGH CARVE-OUT IN THE SETTLEMENT CONTEXT HAS ADDITIONAL ADVANTAGES 20

A. Carve-Out Is Fair To Plaintiffs 20

B. Carve-out Will Not Deter Settlements 20

C. Carve-Out Will Not Complicate Antitrust Cases Or Pose Manageability Problems For Trial Courts 22

CONCLUSION 23

TABLE OF AUTHORITIES

PAGE

CASES:

Brightheart v. *McKay*, 420 F.2d 242 (D.C. Cir. 1969) 13

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In re Corrugated Container Antitrust Litigation, M.D.L. 310 (S.D. Tex.) 1

In re Corrugated Container Antitrust Litigation, 84 F.R.D. 40 (S.D. Tex. 1979)..... 7

Cooper Stevedoring Co. v. *Fritz Kopke, Inc.*, 417 U.S. 106 (1974) 9,10,11

Coopers & Lybrand v. *Livesay*, 437 U.S. 463 (1978) . 8

Doyle v. *United States*, 441 F. Supp. 701 (D.S.C. 1977) 9,14

Edmonds v. *Compagnie Generale Transatlantique*, 443 U.S. 256 (1979)..... 10

In re Fine Paper Antitrust Litigation, M.D.L. 323 (E.D. Pa.) 21

In re Folding Carton Antitrust Litigation, M.D.L. 250 (N.D. Ill.) 21

In re Glassine and Greaseproof Antitrust Litigation, No. 80-891 (E.D. Pa.) 21

Glus v. *G. C. Murphy Co.*, 629 F.2d 248 (3d Cir.), *petition for cert. filed sub nom. Retail, Wholesale & Dep't Store Union* v. *G. C. Murphy Co.*, 49 U.S.L.W. 3252 (Sept. 22, 1980) (No. 80-461) 9,10,11

Gomes v. *Brodhurst*, 394 F.2d 465 (3d Cir. 1968). 9,11,12,13

Heizer Corp. v. *Ross*, 601 F.2d 330 (7th Cir. 1979). 10,11,16

PAGE

Hooley v. *Red Carpet Corp. of America*, 1975 Trade Cas. (CCH) ¶60,285 (D. Ore. 1975), *appeal dismissed*, 549 F.2d 643 (9th Cir. 1977) 8

Judson v. *Peoples Bank & Trust Co.*, 17 N.J. 67, 110 A.2d 24 (1954) 12,13,20

Kohr v. *Allegheny Airlines, Inc.*, 504 F.2d 400 (7th Cir. 1974), *cert. denied*, 421 U.S. 978 (1975) 10

Leger v. *Drilling Well Control, Inc.*, 592 F.2d 1246 (5th Cir. 1979) 14,17,20

Little Rock School District v. *Borden, Inc.*, 1980-1 Trade Cas. (CCH) ¶63,059 (E.D. Ark. 1979) 14

Martello v. *Hawley*, 300 F.2d 721 (D.C. Cir. 1962) .. 9,13

Merryweather v. *Nixan*, 101 Eng. Rep. 1337 (K.B. 1799) 9

Olson Farms, Inc. v. *Safeway Stores, Inc.*, 1977-2 Trade Cas. (CCH) ¶51,698 (D. Utah 1977), *affirmed*, 1979-2 Trade Cas. (CCH) ¶62,995 (10th Cir. 1979), *en banc rehearing granted and pending* (Dec. 27, 1979) .. 16,18,19

Perma Life Mufflers, Inc. v. *International Parts Corp.*, 392 U.S. 134 (1968) 15

Pfizer Inc. v. *Government of India*, 434 U.S. 308 (1978) 15

In re Plywood Antitrust Litigation, M.D.L. 159 (E.D. La.) 21

Professional Beauty Supply, Inc. v. *National Beauty Supply, Inc.*, 594 F.2d 1179 (8th Cir.), *en banc rehearing denied* (April 17, 1979) 9,10,11,13,14,15,18,19,22

Rose v. *Associated Anesthesiologists*, 501 F.2d 806 (D.C. Cir. 1974) 20

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PAGE

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FEDERAL RULES OF CIVIL PROCEDURE:

Rule 42(b) 22

OTHER AUTHORITIES:

S. Rep. No. 428, 96th Cong., 1st Sess. 19 (1979) 21

Antitrust Equal Enforcement Act of 1979: Hearings on S. 1468 Before the Subcommittee on Antitrust, Monopoly and Business Rights of the Committee on the Judiciary, 96th Cong., 1st Sess. 45 (1979)..... 8

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BRIEF OF WEYERHAEUSER COMPANY AND WILLAMETTE INDUSTRIES, INC. AS AMICI CURIAE

INTEREST OF AMICI CURIAE

Weyerhaeuser Company and Willamette Industries, Inc. file this amicus brief to address important issues concerning the equitable apportionment of damages among defendants in antitrust cases which otherwise might not be discussed by the parties.[1]

Weyerhaeuser and Willamette are defendants in *In re Corrugated Container Antitrust Litigation*, M.D.L. 310 (S.D. Tex.), in which plaintiffs allege a nationwide conspiracy to fix

[1] Pursuant to Supreme Court Rule 36.2, the parties have consented in writing to the filing of this amicus brief. Letters expressing such consent are on file with the Clerk of the Supreme Court.

the prices of corrugated containers and corrugated sheets. In *Corrugated,* certain defendants sought to achieve proportionate liability through carve-out[2] and contribution.[3] *Corrugated* is a multi-defendant, class-action case in which several settlements have occurred. *Texas Industries* is a single-defendant, nonclass case involving no settlements. Despite these factual differences, the fundamental issue raised in both suits is proportionate liability in antitrust cases.

These amici curiae favor equitable apportionment of damages in antitrust cases, but believe it is important to recognize that such apportionment can be achieved through two different methods (contribution and carve-out) and that in each case the method appropriate to the particular factual circumstances should be used. In *Texas Industries,* petitioner, because of the particular facts of its case, is likely to focus solely on contribution as the method of achieving proportionate liability. It might not address the need for, or the proper way to achieve, proportionate liability in a multi-defendant, settlement case such as *Corrugated.* As demonstrated below, contribution is appropriate in the *Texas Industries*-type case, but should not be allowed against settling defendants, as in *Corrugated.* Rather, proportionate liability in the settlement context should be achieved through carve-out.

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[2] "Carve-out" is the reduction of the potential liability of nonsettling defendants by the proportionate share of liability attributable to defendants who have settled. Some refer to carve-out as "claim-reduction." The two terms are synonymous.

[3] This Court granted a writ of certiorari in *Corrugated* but subsequently dismissed the writ. *Westvaco Corp.* v. *Adams Extract Co., cert. granted,* 48 U.S.L.W. 3820 (June 16, 1980) (No. 79-972), *cert. dismissed,* 49 U.S.L.W. 3288 (Oct. 20, 1980), *petition for rehearing filed* (Nov. 14, 1980). Although Weyerhaeuser and Willamette settled the class-action portion of *Corrugated,* they remain defendants in the nonclass cases, which seek substantial recoveries and raise issues of proportionate liability.

Since contribution is only one facet of the underlying issue of proportionate liability in antitrust cases, the Court should not ignore the impact its decision here regarding contribution will have in multi-defendant, settlement cases. These amici curiae file this brief in the hope that it will aid the Court in fashioning a proportionate liability doctrine that will operate harmoniously in both the settlement and nonsettlement contexts.

SUMMARY OF ARGUMENT

Fairness, justice and common sense dictate that proportionate liability should exist in antitrust cases. No single defendant should have to pay—or, equally important in many cases, face the risk of having to pay—all of plaintiff's alleged damages when he was at worst only partially responsible for them. The need for proportionate liability is demonstrated by the settlement coercion in *Corrugated*. In that case, the absence of proportionate liability caused defendants to face the risk of sole liability for an estimated $5 billion in alleged damages, less only the actual dollar amount of settlements. Many defendants, unable to assume that risk, were forced to forego their right to trial and to settle without regard to culpability or possible damage caused.

This Court should adopt proportionate liability in antitrust cases, as it has in other contexts, because it is fundamentally fair. The trend of the law is clearly toward broader application of proportionate liability.

Proportionate liability may be achieved in different ways depending upon the factual circumstances of the case. Contribution is appropriate among nonsettling defendants and between defendants and non-defendant co-conspirators. However, in a multi-defendant case involving settlements, contribution against settlors should not be allowed. Rather, in the settlement context, proportionate liability should be achieved by "carving out" from the potential liability faced by nonsettling defendants the proportionate share attributable to those defendants who have settled. Carve-out

has been applied in an increasing number of cases, including large class action treble damage suits. It guarantees that no single defendant will be liable—or face the risk of liability—for an entire universe of alleged damages for which he was not, or was only partially, responsible.

In addition to being fundamentally fair, proportionate liability in antitrust cases, particularly through carve-out, is appropriate because it promotes the congressional policies of deterrence and disgorgement underlying the antitrust laws. Carve-out also accommodates the public policies favoring equitable settlements and poses no manageability problems for the trial courts.

ARGUMENT

I. *CORRUGATED* DEMONSTRATES THE UNFAIRNESS WHICH RESULTS FROM THE ABSENCE OF PROPORTIONATE LIABILITY.

In *Corrugated,* the possibility that there would be no proportionate liability effectively coerced defendants into foregoing their right to trial and settling for amounts unrelated to the merits of plaintiffs' case. The scenario in *Corrugated* conclusively demonstrates the need for proportionate liability in antitrust cases.

A. Without Proportionate Liability, *Corrugated* Defendants Were Coerced To Settle For Progressively Increased Amounts Because They Could Not Risk Sole Liability For The Enormous Alleged Damages.

Corrugated has its genesis in a federal grand jury price-fixing investigation of the corrugated container industry. In January 1978, the grand jury indicted fourteen manufacturers and twenty-six of their employees. Willamette was not indicted. Weyerhaeuser, along with certain other defendants, pleaded *nolo contendere.* The trial of the remaining defendants, including three Weyerhaeuser employees, began on January 22, 1979 and lasted fifteen weeks. After less than three hours of deliberation, the jury acquitted.

Before the grand jury returned the indictments, thirty-seven manufacturers of corrugated products, twenty-three of whom were never indicted, were named as defendants in treble damage class actions. The district court subsequently certified a class covering purchases during an eighteen-year period. Each defendant faced potential sole liability for $5 billion or more in damages, according to plaintiffs' estimate, making the case one of the largest in history.

Plaintiffs quickly settled with St. Regis Paper Company, an unindicted defendant, for $1.7 million and with International Paper Company ("IP"), a felony indictee, for $8.3 million. The settlement amounts were based on a "point" system which plaintiffs designed and used throughout much of the settlement process.[4]

In December 1978, the class plaintiffs settled with Union Camp Corporation, an unindicted defendant, for $2 million per point, twice the amount paid by IP, a felony indictee. After the announcement of the Union Camp deal, defendants stampeded to plaintiffs' offices to settle before plaintiffs further increased the price per point.

The reasons for the stampede are plain. The Union Camp settlement made it clear that plaintiffs would "up the ante" for each successive settlement. In the absence of proportionate liability, each successive settlement increased the nonsettlor's risk of sole liability for the estimated $5 billion damages (less only the actual dollar amount of the settlements). Defendants—even those who were unindicted and convinced of their innocence—found that risk unacceptable as a matter of prudent business judgment.

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[4] The term "point" refers to a defendant's percentage of the total corrugated container and sheet sales made by all defendants between 1972 and 1976. A defendant with one percent of defendants' total sales would have one point. Plaintiffs' $1.7 million settlement with St. Regis equalled approximately $500,000 per point. IP paid $1 million per point.

The inequities and arbitrariness inherent in the coercive settlement process due to the absence of proportionate liability are evident in a comparison of the IP settlement with those of Willamette and Weyerhaeuser. Willamette with 4.18 points (*i.e.*, percent of defendants' market) was not indicted by the grand jury and, even though it did not participate at trial, its innocence was confirmed by the jury.[5] In contrast, IP, with 8.3 points, was a felony indictee found by the jury in the class action trial to be a conspirator. Nevertheless, Willamette, as a late settlor, was compelled by the absence of proportionate liability to pay $11,286,000 in settlement, while IP, through a quick, early settlement, paid only $8.3 million.[6]

Weyerhaeuser, with 7.83 points, also had a smaller market share than IP, yet Weyerhaeuser paid more than four times as much as IP in total dollars—$39 million compared to IP's $8.3 million. Since Weyerhaeuser was a late settlor, plaintiffs were able to demand in the absence of proportionate liability that it pay five times the rate IP paid. The Continental Group, Inc., which was later acquitted in the criminal case and was one of the last companies to settle, was forced to pay six and one-half times the IP rate.

B. Innocent Defendants In *Corrugated* Were Forced To Forego Their Right To Trial.

While many defendants might have gone to trial and proved themselves innocent if proportionate liability had applied, the staggering risk of possible sole liability for an entire industry left defendants with no realistic choice but to

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[5] In the one civil case that was tried, the jury vindicated fourteen defendants by finding that they were not members of the alleged conspiracy. Yet those innocent defendants, because of the settlement coercion arising from the absence of proportionate liability, paid over $47 million to the class plaintiffs in settlements.

[6] It has been noted that, as a general proposition, a defendant which considers itself likely to be found guilty is most apt to seek an early, sweetheart settlement. *Manual for Complex Litigation* §1.46 at 63 (1977). An innocent defendant, reluctant to settle at all, would likely be the last to settle.

settle. Thus, before a single deposition was taken, plaintiffs garnered almost $300 million in settlements.

That plaintiffs' settlement techniques were inherently coercive is not disputed even by the trial court:

> It appears that Westvaco seeks contribution primarily to avoid the coercive impact to it, as a late-settling or non-settling defendant, of the possibility of enormous damages being assessed against it. *That this possibility is inherently coercive is undisputable . . . . Even a defendant relatively certain of a judgment in his favor must have serious doubts about risking such exposure by going to trial.*

In re Corrugated Container Antitrust Litigation, 84 F.R.D. 40, 41 (S.D. Tex. 1979) (emphasis added). The court's evaluation of the risk proved accurate. All but one of the thirty-seven defendants thus far have been compelled to capitulate to plaintiffs' demands.

The risk—even if remote—of potentially ruinous exposure and the devastating impact of such risk on relatively small defendants is well illustrated by the plight of Green Bay Packaging Company, Inc., a family-owned corrugator not indicted by the grand jury. Green Bay, determined to prove its innocence at trial, resisted an early settlement. As more defendants settled, however, Green Bay became less able to withstand the risk of enormous and ever-growing liability. Plaintiffs offered to settle with Green Bay for $3.7 million per point, a rate approximately *seven and one-half times* higher than the settlement offered to St. Regis. Green Bay was confronted with the Hobson's choice of paying the settlement or bearing the risk, however remote, of a billion dollar or more judgment by going to trial. As George F. Kress, founder and president of Green Bay, stated:

> The effect of this extortive settlement practice upon a small, family-owned and managed business is catastrophic. We were threatened with a loss of over 50 years of effort, and coerced into paying an

> exorbitant settlement rather than being afforded the privilege of ultimately proving our corporate innocence.[7]

The company finally capitulated to plaintiffs' demands. The reality and inequity of the coercion which Green Bay suffered because of the absence of proportionate liability was made clear by the special verdict returned in the class-action trial: the jury specifically found that Green Bay did not participate in the alleged conspiracy.

One commentator observed that in *Corrugated* "defendants had little or no choice but to settle, even if they were innocent of wrongdoing, because of the potentially staggering liability" facing them.[8] Recent Developments, *Contribution Among Antitrust Defendants,* 33 Vand. L. Rev. 979, 995 (1980) (footnote omitted). Indeed, the risk of the staggering potential liability caused Westvaco, one of the defendants who stood trial, to capitulate and settle for nearly $1 million just days before the conclusion of the civil trial. Yet, at the

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[7] *Antitrust Equal Enforcement Act of 1979: Hearings on S. 1468 Before the Subcommittee on Antitrust, Monopoly and Business Rights of the Committee on the Judiciary,* 96th Cong., 1st Sess. 45 (1979) (statement of George F. Kress).

[8] Concern with the fair disposition of class action treble damage suits has often been expressed, quite apart from the context of proportionate liability, in light of the enormity of the potential liability involved. As this Court observed in *Coopers & Lybrand* v. *Livesay,* 437 U.S. 463, 476 (1978):

> Certification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense.

See Hooley v. *Red Carpet Corp. of America,* 1975 Trade Cas. (CCH) ¶60,285 at 66,112 (D. Ore. 1975), *appeal dismissed,* 549 F.2d 643 (9th Cir. 1977) (enormous risk of class action treble damages "may well result in some or all of the defendants opting for a settlement . . . whether they were guilty of the plaintiffs' allegations or not").

hearing on the preliminary approval of Westvaco's settlement, the trial court stated that both it and the jury would have found that Westvaco was not a member of the conspiracy.[9]

The settlement coercion and the inability of innocent defendants in *Corrugated* to exercise their right to trial conclusively demonstrate the need for proportionate liability in antitrust cases.

II. THIS COURT SHOULD ADOPT PROPORTIONATE LIABILITY IN ANTITRUST CASES, AS IT HAS IN OTHER CONTEXTS, BECAUSE IT IS FUNDAMENTALLY FAIR.

The archaic common law rule against proportionate liability, originating in the English case of *Merryweather* v. *Nixan*, 101 Eng. Rep. 1337 (K.B. 1799), has been rejected in England and by a growing number of American courts in increasingly diverse contexts.[10] This Court has consistently favored proportionate liability in the cases in which the issue has been raised. *E.g., United States* v. *Reliable Transfer Co.*, 421 U.S. 397, 411 (1975); *Cooper Stevedoring Co.* v. *Fritz Kopke, Inc.*, 417 U.S. 106, 111 (1974).

Courts of appeals have apportioned liability in a variety of contexts.[11] In *Professional Beauty Supply, Inc.* v. *National*

[9] Transcript of Proceedings, September 16, 1980, at 10-12, *In re Corrugated Container Antitrust Litigation*, M.D.L. 310 (S.D. Tex.).

[10] Jacobson, *Contribution Among Antitrust Defendants: A Necessary Solution To A Recurring Problem*, 32 U. Fla. L. Rev. 217, 225 (1980).

[11] *E.g.*, sex discrimination under Title VII of the Civil Rights Act of 1964, *Glus* v. *G. C. Murphy Co.*, 629 F.2d 248 (3d Cir.), *petition for cert. filed sub nom. Retail, Wholesale & Dep't Store Union* v. *G.C. Murphy Co.*, 49 U.S.L.W. 3252 (Sept. 22, 1980)(No. 80-461); negligence, *Gomes* v. *Brodhurst*, 394 F.2d 465 (3d Cir. 1968) and *Martello* v. *Hawley*, 300 F.2d 721 (D.C. Cir. 1962); wrongful death, *Doyle* v. *United States*, 441 F. Supp. 701 (D.S.C. 1977); securities,

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Beauty Supply, Inc., 594 F.2d 1179 (8th Cir.), *en banc rehearing denied* (April 17, 1979), the Eighth Circuit, unlike the Fifth Circuit in the instant case, held that proportionate liability exists in antitrust cases. The Third Circuit recently noted the trend in favor of proportionate liability, stating that "the rule prohibiting contribution has come into disrepute." *Glus* v. *G. C. Murphy Co.*, 629 F.2d 248, 252 (3d Cir.), *petition for cert. filed sub nom. Retail, Wholesale & Dep't Store Union* v. *G. C. Murphy Co.*, 49 U.S.L.W. 3252 (Sept. 22, 1980) (No. 80-461).[12]

The rule prohibiting proportionate liability has been rejected principally because it is fundamentally unfair. It required a defendant to pay—or bear the risk of having to pay—damages he did not cause. As this Court stated in *Cooper Stevedoring:*

> A "more equal distribution of justice" can best be achieved by ameliorating the common-law rule against contribution which permits a plaintiff to force one of two wrongdoers to bear the entire loss, though the other may have been equally or more to blame.

417 U.S. at 111 (citation omitted). *See Edmonds* v. *Compagnie Generale Transatlantique,* 443 U.S. 256, 271-72 n.30 (1979).

Fairness has also been the determining consideration that has led several courts of appeals to embrace a system of proportionate liability. In *Professional Beauty Supply,* the Eighth Circuit revealed that "the deciding factor in our

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Heizer Corp. v. *Ross,* 601 F.2d 330 (7th Cir. 1979); and airline disasters, *Kohr* v. *Allegheny Airlines, Inc.*, 504 F.2d 400 (7th Cir. 1974), *cert. denied,* 421 U.S. 978 (1975).

[12] Similarly, in *Edmonds* v. *Compagnie Generale Transatlantique,* 443 U.S. 256, 271-72 n.30 (1979), this Court summarized the current state of the law by noting that "normally, the chosen tortfeasor may seek contribution from another concurrent tortfeasor."

decision [to apportion liability] is fairness between parties." 594 F.2d at 1185. It went on to say:

> There is an obvious lack of sense and justice in a rule which permits the entire burden of restitution of a loss for which two parties are responsible to be placed upon one alone because of the plaintiff's whim or spite, or his collusion with the other wrongdoer.

Id. at 1185-86 (citation omitted). Expressly following the rationale of *Professional Beauty Supply,* the Seventh Circuit recently permitted contribution in a Rule 10b-5 case, noting that proportionate liability results in "a 'more equal distribution of justice.' " *Heizer Corp.* v. *Ross,* 601 F.2d at 332, *quoting Cooper Stevedoring,* 417 U.S. at 111.

In an earlier case involving settlements, *Gomes* v. *Brodhurst,* 394 F.2d 465 (3d Cir. 1968), proportionate liability was achieved through carve-out. The Third Circuit observed in *Gomes*:

> There is no longer a legitimate place in our system, if, indeed, there ever was, for a rule of law which places the full burden of restitution upon one who is only in part responsible for a plaintiff's loss.[13]

Id. at 467. The fundamental unfairness of a rule prohibiting proportionate liability has led this and other courts to abandon the rule in many contexts and is, standing alone, sufficient grounds for rejecting it in antitrust cases as well.

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[13] The court affirmed that view in *Glus,* where it noted:

> It is now widely recognized that fundamental fairness demands a sharing of the liability. Without a right of contribution a wrongdoer may escape liability for his actions because of the happenstance of the plaintiff's choice of defendants.

629 F.2d at 252.

III. PROPORTIONATE LIABILITY SHOULD BE ACHIEVED THROUGH CARVE-OUT IN CASES IN WHICH SETTLEMENTS HAVE OCCURRED.

Proportionate liability may be achieved through different methods, depending upon the context of the case.[14] Contribution apportions liability equitably among nonsettling defendants, and between defendants and nondefendant co-conspirators. However, contribution should not be permitted against settling defendants. The possibility that a settling defendant will be liable to nonsettlors for his contribution share would destroy the settlor's expectations of repose and therefore would chill his motivation to settle. *Gomes* v. *Brodhurst*, 394 F.2d at 468.

In the settlement context, proportionate liability should be achieved through carve-out. Carve-out renders contribution from settlors unnecessary,[15] and therefore assures the settlor that his settlement with plaintiffs will be the full extent of his liability in the case.

Several courts have adopted the carve-out approach in settlement contexts. One of the earliest and most instructive of these cases was *Judson* v. *Peoples Bank & Trust Co.*, 17 N.J. 67, 110 A.2d 24 (1954). In *Judson*, the court was required to determine the effect of settlements on the contribution rights of the nonsettling defendants. The court, in an opinion written by Mr. Justice Brennan while he was a member of the Supreme Court of New Jersey, concluded that the dollar

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[14] Regardless of the method employed, proportionate liability does not alter a defendant's joint and several liability. Where contribution or carve-out applies, a plaintiff remains entitled to recover his entire judgment from a single defendant, if he so chooses. The remedy of a sole defendant under such circumstances is to seek contribution from the remaining wrongdoers.

[15] When the settling defendant's share of liability is carved out from the potential liability the nonsettling defendants would otherwise face, nonsettlors remain liable only for the damages fairly allocable to them. Thus, they have no need to seek contribution from settlors.

amount of liability attributable to settling defendants must be deducted from any damages ultimately recoverable from nonsettling defendants.[16] Justice Brennan regarded removal of the settling defendant's share of damages from the potential amount recoverable from remaining defendants as both necessary and practical. He stated that this solution effectively blends the themes of compromise and contribution while maintaining the essential integrity of each.

Under *Judson*, a settlor's liability for contribution is discharged; a credit, equal to the settlor's proportionate share of damages, is applied to the total damage award. The nonsettlors' contribution rights are extinguished to the extent of the proportionate reduction in damages, making the settlement final. Thus, the policy favoring settlements is not impaired. 110 A.2d at 36-37.[17]

The Third Circuit applied carve-out in *Gomes* v. *Brodhurst*, 394 F.2d 465 (3d Cir. 1968), where, as in *Corrugated*, a nonsettling defendant sought contribution from a settling defendant. The court of appeals resolved the issue by directing the district court to carve out from the original verdict the amount that would have represented the settling

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[16] This Court need not consider at the present juncture the method by which a settling defendant's share of liability should be determined, although it may wish to do so. A number of alternatives exist, including a pro rata division of damages *(Professional Beauty Supply)* or an apportionment of damages based on comparative fault *(Gomes)*. The optimal and practical method of determination in a case such as *Corrugated* would be to carve out from the sum of any eventual damages a proportionate amount equal to the settling defendants' combined market shares. In *Corrugated*, such market share data was available to plaintiffs even before discovery began and, in fact, was used by plaintiffs as the basis for settlement negotiations.

[17] Another early case that adopted the carve-out approach in the settlement context was *Martello* v. *Hawley*, 300 F.2d 721 (D.C. Cir. 1962). That approach was reaffirmed in *Brightheart* v. *McKay*, 420 F.2d 242 (D.C. Cir. 1969).

defendant's share of liability, had it not settled. It expressly rejected the approach taken by the district court, which subtracted from the damage award only the amount of the actual settlement figure. The Third Circuit reasoned that this result was the only proper accommodation of the policies of fairness underlying contribution and those favoring voluntary settlement. *Id.* at 467-70. By carving out the settling defendant's proportionate share of liability, the court preserved the settlement while leaving the nonsettling defendant responsible only for his proportionate share of the judgment.[18]

The desire to preserve settlements and to implement *Professional Beauty Supply*'s concern for fairness among all parties in the settlement context prompted a district court in a recent price-fixing case, *Little Rock School District* v. *Borden, Inc.*, 1980-1 Trade Cas. (CCH) ¶63,059 (E.D. Ark. 1979), to adopt carve-out. The court held that any settlement between plaintiffs and any defendant "must release non-settling defendants from liability for the settling defendant's actions and also

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[18] The Fifth Circuit has held that, where proportionate liability is proper, it should be achieved in the settlement context through carve-out. Thus, in *Leger* v. *Drilling Well Control, Inc.*, 592 F.2d 1246 (5th Cir. 1979), a non-collision maritime personal injury case in which plaintiff settled with two of the defendants, the court held that Leger had relinquished any claims he had against settlors and that the judgment against the third defendant would be reduced by no more or less than the amount attributable to the settlors.

Similarly, in *Doyle* v. *United States*, 441 F. Supp. 701, 713 n.5 (D.S.C. 1977), the court applied carve-out in holding that a nonsettling defendant should receive "an equitable credit" that represents a settling defendant's proportionate share of total damages, regardless of the amount actually paid by him in settlement. This result protects nonsettling defendants from the inequity of being held liable for more than their fair share of damages. It does so by removing the settlors' proportionate share of damages from the litigation, thus rendering unnecessary any post-settlement contribution claims against them by nonsettling defendants.

release the settling defendant from any liability for contribution . . . ." *Id.* at 77,252.

IV. PROPORTIONATE LIABILITY IS PARTICULARLY APPROPRIATE IN ANTITRUST CASES BECAUSE IT PROMOTES THE DETERRENCE AND DISGORGEMENT POLICIES UNDERLYING THE ANTITRUST LAWS.

An additional, independent reason for adopting proportionate liability in antitrust cases is the fact that it promotes the congressional policies underlying the antitrust treble damage action: deterrence of future antitrust violations and disgorgement of the violator's illegal gains. *Pfizer Inc.* v. *Government of India,* 434 U.S. 308, 314 (1978); *Perma Life Mufflers, Inc.* v. *International Parts Corp.,* 392 U.S. 134, 138-39 (1968).

A. Proportionate Liability Enhances Deterrence.

This Court and others have consistently recognized that proportionate liability enhances deterrence. In *United States* v. *Reliable Transfer Co.,* 421 U.S. at 405 n.11, this Court stated that a rule which fairly apportions liability "imposes the strongest deterrent upon the wrongful behavior that is most likely to harm others." That observation is no less true with respect to enforcement of the antitrust laws. Indeed, the absence of proportionate liability undermines deterrence of antitrust violations because some guilty defendants may escape punishment altogether. In *Professional Beauty Supply,* the Eighth Circuit concluded:

> The fact that one tortfeasor may be held liable for all the damages arising from the antitrust violation necessarily means that other joint tortfeasors may go "scot free." This possibility of escaping all liability might cause many to be more willing, rather than less willing, to engage in wrongful activity. . . . To deny contribution would be to dilute the deterrent effect of the antitrust laws, since a participant in an antitrust violation could escape all responsibility for its wrongdoing.

594 F.2d at 1185. Similarly, the Seventh Circuit in *Heizer* recognized that "by apportioning the loss among joint wrongdoers the deterrent effect of the judgment is felt by all culpable parties . . . ." 601 F.2d at 332.[19]

The Fifth Circuit concluded in this case that proportionate liability will not enhance deterrence.[20] It reasoned that a businessman faced with the remote possibility of sole liability for massive damages is less likely to violate the antitrust laws than a businessman faced with near certain, but shared, liability. However, that conclusion is inconsistent not only with business realities, but also with the Fifth Circuit's own position in prior proportionate liability cases.

With respect to the impact of proportionate liability on businessmen, one commentator has recently concluded that it ultimately deters businessmen from disobeying the law. Note, *Contribution in Private Antitrust Actions,* 93 Harv. L. Rev. 1540, 1545-46 (1980). He concludes that it is often middle level managers' decisions that lead to antitrust violations. Their goals are career advancement, so they are likely to be more concerned about the impact of detection on their careers than about the magnitude of their employers' liability. Increasing the likelihood through proportionate liability that more companies will pay their fair share of damages for

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[19] In *Olson Farms, Inc.* v. *Safeway Stores, Inc.*, 1979-2 Trade Cas. (CCH) ¶62,995 at 79,707 (10th Cir. 1979), *en banc rehearing granted and pending* (Dec. 27, 1979), Judge Holloway, in the dissenting portion of his opinion, stated: "In view of the deterrent function of trebled damages, it is only logical that others engaged in the violations ought to bear some of the punishment and face deterrence." (citation omitted.)

[20] *Wilson P. Abraham Construction Corp.* v. *Texas Industries, Inc.*, 604 F.2d 897, 901 (5th Cir.), *en banc rehearing denied,* 608 F.2d 524 (1979), *cert. granted sub. nom. Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 49 U.S.L.W. 3332 (November 4, 1980) (No. 79-1144).

antitrust violations increases the likelihood that such violators will be identified and disciplined. Consequently, proportionate liability fosters corporate vigilance and increases deterrence:

> The deterrent effect of a determination that those managers violated the antitrust laws would not be tied to the magnitude of liability because firm sanctions against such managers depend primarily upon the fact of violation. Under such circumstances, allowing contribution would best deter antitrust violations, for it would increase the probability that the company will be held liable for those violations and hence increase the frequency of company sanctions against overzealous employees.

93 Harv. L. Rev. at 1546 (footnotes omitted).

The Fifth Circuit's contrary conclusion in this case is inconsistent with one of its own recent decisions. In *Leger* v. *Drilling Well Control, Inc.*, 592 F.2d 1246, 1249 (5th Cir. 1979), the court characterized as "cogent" this Court's reasoning in *Reliable Transfer* that proportionate allocation of damages imposes the strongest deterrent against wrongful conduct.

Thus, the overwhelming weight of authority—including the Fifth Circuit's own prior decision in *Leger*—supports the conclusion that proportionate liability more effectively deters violations of the law than a system which permits some wrongdoers to escape liability "scot-free."

B. Proportionate Liability Better Assures Disgorgement Of Any Illegal Gains.

Without proportionate liability, a wrongdoer not named as a defendant is immune from civil liability and is therefore permitted to retain the fruits of his illegal conduct. With proportionate liability, however, that same violator will very likely be compelled to disgorge his illegal profits. *Texas Industries* clearly illustrates how non-defendant wrongdoers escape disgorgement under the Fifth Circuit's no-contribution

rule. Although four companies were indicted and pleaded *nolo contendere* to price-fixing charges in the criminal case out of which *Wilson P. Abraham Construction Corp.* v. *Texas Industries, Inc.* arose, plaintiff sued only one indictee, Texas Industries. Only if Texas Industries' contribution claim against the three remaining indictees is allowed will they be required to surrender any fruits of their alleged unlawful conduct.

The *Texas Industries* situation is not uncommon. In *Cackling Acres, Inc.* v. *Olson Farms, Inc.*, 541 F.2d 242 (10th Cir. 1976), *cert. denied*, 429 U.S. 1122 (1977), certain egg producers alleged that Olson Farms and four other egg distributors had fixed at artificially low levels the prices at which the distributors bought eggs from the producers. Plaintiffs, however, sued only Olson Farms; the four other alleged co-conspirators, who purchased 88% of the eggs involved, were never named as defendants.[21] The jury found that the four non-defendant distributors participated in the

[21] It was revealed at trial that plaintiffs chose not to sue the other distributors because plaintiffs wished to preserve their business relationship with them. Petition for Rehearing at 4, n.2, *Olson Farms, Inc.* v. *Safeway Stores, Inc.*, 1979-2 Trade Cas. (CCH) ¶62,995 (10th Cir. 1979), *en banc rehearing granted and pending* (December 27, 1979). Judge Holloway, concurring and dissenting, recognized the dangers of selective enforcement of the antitrust laws by private plaintiffs. He noted that plaintiffs have the potential of deliberately choosing to sue "a less formidable, but financially responsible defendant, and avoiding litigation with other equally culpable parties." He concluded that, "if contribution should be denied in such circumstances, the deterrent policy of the antitrust statutes will be significantly frustrated." *Id.* at 79,706-07.

The court in *Professional Beauty Supply* anticipated Judge Holloway's concerns. The Eighth Circuit concluded that the possibility of a particular violator escaping liability altogether "significantly increases where a large or powerful tortfeasor has sufficient economic influence to prevent a plaintiff from including it as a defendant." 594 F.2d at 1185.

alleged conspiracy with Olson Farms. A $2.4 million judgment, based upon the purchases of all five distributors, was entered against Olson Farms, which paid the judgment in full. Olson Farms' contribution claim against the other four egg distributors was dismissed.[22] The non-defendant co-conspirators, responsible for 88% of the damages, so far have retained every penny of their illegal gains. Only if Olson Farms is eventually allowed contribution will the co-conspirators be compelled to disgorge any illegal gains.

C. Carve-Out, In Particular, Promotes Deterrence And Disgorgement By Discouraging "Sweetheart" Settlements.

With proportionate liability achieved through carve-out in the settlement context, plaintiffs are more inclined to strive for a settlement from each defendant for an amount commensurate with that defendant's alleged liability. Quick, "sweetheart" settlements with the most culpable defendants are uneconomical to plaintiffs and therefore occur infrequently. Knowledge on the part of would-be violators that they cannot violate the law and then escape the ensuing liability through fortuitous naming of defendants, side-deals or cheap settlements provides a strong deterrence against illegal conduct. Also, the elimination of sweetheart deals better assures that those defendants most likely to be found liable will suffer commensurate disgorgement. Defendants less likely to be found liable will either achieve settlements reflecting that fact or seek vindication at trial.

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[22] *Olson Farms, Inc.* v. *Safeway Stores, Inc.*, 1977-2 Trade Cas. (CCH) ¶61,698 (D. Utah 1977), *affirmed*, 1979-2 Trade Cas. (CCH) ¶62,995 (10th Cir. 1979), *en banc rehearing granted and pending* (Dec. 27, 1979). Thus, although the Tenth Circuit initially denied contribution, it has decided to reconsider the question *en banc*. Of the three judges on the original *Olson Farms* panel, the two members of the Tenth Circuit split their votes—Judge Holloway filed an opinion which agreed with *Professional Beauty Supply*. The third judge, sitting by designation, wrote the panel opinion.

V. ACHIEVING PROPORTIONATE LIABILITY THROUGH CARVE-OUT IN THE SETTLEMENT CONTEXT HAS ADDITIONAL ADVANTAGES.

A. Carve-out Is Fair To Plaintiffs.

In addition to allocating damages fairly among settling and nonsettling defendants, carve-out is fair to plaintiffs. With carve-out, plaintiffs, in exchange for the settlements they obtain, release their claims against settlors. *Rose* v. *Associated Anesthesiologists,* 501 F.2d 806 (D.C. Cir. 1974). The fairness to plaintiffs of such a procedure was recognized by Mr. Justice Brennan in *Judson:*

> The injured party . . . cannot complain of unfairness, since "the reduction would be a direct result of his own act in accepting less than the settlors' pro rata share of the total recoverable damages in settlement with the compromising wrongdoer."

110 A.2d at 37 (citations omitted). Certainly, carve-out will not render plaintiffs unable to recover fully for their injuries.[23]

B. Carve-Out Will Not Deter Settlements.

Any argument that carve-out deters settlements is demonstrably meritless. Defendants' ability and willingness to buy peace is the same under carve-out as it is under a rule of no proportionate liability. Nor does carve-out deter plaintiffs from settling. Indeed, even in *Corrugated,* prior to the verdict

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[23] Indeed, in *Leger* v. *Drilling Well Control, Inc.,* 592 F.2d 1246 (5th Cir. 1979), the plaintiff's total recovery under carve-out actually exceeded the judgment in the case. Plaintiff settled with one defendant for an amount which was subsequently determined by the jury to be greater than that defendant's actual share of liability. The Fifth Circuit reduced the judgment against the remaining defendant not by the actual settlement amount but only by the settlor's proportionate share of damages as determined by the jury. By retaining the settlement overage and also recovering the full amount of the nonsettlor's proportionate share of damages, the plaintiff recovered more than the judgment amount.

in the class-action case, Westvaco entered into a settlement under which the amount of damages attributable to its sales of corrugated products was carved out from the universe of damages recoverable. Antitrust plaintiffs in several other cases as well have specifically provided for carve-out in their settlements.[24]

As an American Bar Association Antitrust Section Report notes, the only settlements that might be chilled would be "unfair settlements based on the risk of massive liability, without regard to culpability or damage caused." [25] As this Court has previously stated: "a rule of fairness in court will produce fair out-of-court settlements." *United States* v. *Reliable Transfer Co.*, 421 U.S. at 408 (footnote omitted).

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[24] *See In re Cement and Concrete Antitrust Litigation*, M.D.L. 296 (D. Ariz.), reported at 932 Antitrust & Trade Reg. Rep. (BNA), D-2-3 (Sept. 27, 1979) and 927 Antitrust & Trade Reg. Rep. (BNA), A-1 (Aug. 16, 1979); *In re Glassine and Greaseproof Antitrust Litigation*, No. 80-891 (E.D. Pa.); *In re Fine Paper Antitrust Litigation*, M.D.L. 323 (E.D. Pa.); *In re Folding Carton Antitrust Litigation*, M.D.L. 250 (N.D. Ill.); *In re Plywood Antitrust Litigation*, M.D.L. 159 (E.D. La.).

[25] American Bar Association, Section of Antitrust Law, *Resolutions and Report of the Section of Antitrust Law of the American Bar Association on Proposed Amendment of the Clayton Act to Permit Contribution in Damage Actions Brought Thereunder* 8 (September 6, 1979), reprinted in 936 Antitrust & Trade Reg. Rep. (BNA) E-2 (October 25, 1979) ("ABA Report"). The Senate Judiciary Committee has also expressly rejected the notion that proportionate liability "will undermine the settlement process." It found that the only settlements proportionate liability "will discourage in the long run are those it is intended to discourage—namely coerced settlements." S. Rep. No. 428, 96th Cong., 1st Sess. 19 (1979).

C. Carve-Out Will Not Complicate Antitrust Cases Or Pose Manageability Problems For Trial Courts.

Opponents of contribution sometimes argue that it would unduly complicate antitrust cases and make them unmanageable.[26] However, no one suggests that, where settlements are involved, carve-out poses such problems. Indeed, carve-out actually simplifies cases because plaintiff does not have to prove at trial the damages attributable to settlors. Furthermore, no additional complaints, cross-claims or other pleadings need to be filed, and the court will not be confronted with severance motions under Federal Rule of Civil Procedure 42(b).

Even if the situation were otherwise, the obvious unfairness of a rule against proportionate liability cannot be justified "simply because it may reduce court costs and make litigation simpler."[27] As this Court stated in *Reliable Transfer:*

> For, at bottom, [this argument] asks us to continue the operation of an archaic rule because its facile application out of court yields quick, though inequitable, settlements, and relieves the courts of some litigation. Congestion in the courts cannot justify a legal rule that produces unjust results in litigation simply to encourage speedy out-of-court accommodations.

421 U.S. at 408.

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[26] Significantly, *Professional Beauty Supply* rejected arguments that contribution, which is not as easy to administer as carve-out, would present manageability problems. 594 F.2d at 1185.

[27] ABA Report at 6.

CONCLUSION

For the foregoing reasons, Weyerhaeuser Company and Willamette Industries, Inc. submit that proportionate liability should exist in antitrust cases and that carve-out should be used to achieve proportionate liability in cases in which one or more defendants have settled. Carve-out is fair to all parties, promotes the congressional policies of deterrence and disgorgement and the policies favoring settlements without complicating the litigation.

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